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Title: 324 Liquor Corp., dba Yorkshire Wine & Spirits,
Appellant
v.
Thomas Duffy, et al.

Court: Court of Appeals of New York

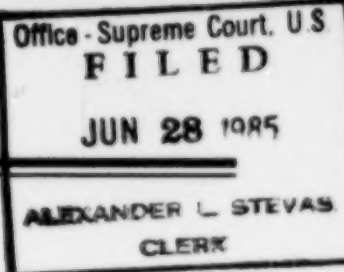
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try	Date	Note	Proceedings and Orders
1	Jun 28 1985	G	Statement as to jurisdiction filed.
3	Jul 19 1985		Order extending time to file response to jurisdictional statement until August 30, 1985.
6	Aug 30 1985		Motion of appellee Thomas Duffy, et al. to dismiss or affirm filed.
7	Sep 4 1985		DISTRIBUTED. September 30, 1985
5	Sep 3 1985	X	Reply brief of appellant 324 Liquor Corp., etc. filed.
9	Oct 7 1985	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
0	Feb 21 1986		Brief amicus curiae of United States filed.
1	Feb 26 1986		REDISTRIBUTED. March 21, 1986
2	Mar 24 1986		PROBABLE JURISDICTION NOTED. ***** Record filed.
3	Apr 16 1986		Brief amicus curiae of United States filed.
4	May 6 1986		Joint appendix filed.
5	May 8 1986		Brief of appellant 324 Liquor Corp., etc. filed.
6	May 16 1986		Order extending time to file brief of appellee on the merits until June 28, 1986.
9	May 20 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
0	Jun 2 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
1	Jun 19 1986		Brief amicus curiae of Metropolitan Package Store Assn, et al. filed.
2	Jun 26 1986		Brief amicus curiae of Wine, Liquor & Distillery Workers Union Local 1, et al. filed.
3	Jun 27 1986		Brief of appellees Thomas Duffy, et al. filed.
4	Jun 27 1986		Brief amicus curiae of Peerless Importers, et al. filed.
5	Jul 1 1986		One large box of lodgings received.
6	Jul 17 1986		CIRCULATED.
7	Sep 3 1986		SET FOR ARGUMENT. Monday, November 3, 1986. (3rd case) (1 hour)
8	Oct 23 1986		Lodging received.
9	Oct 22 1986	X	Reply brief of appellant 324 Liquor Corp., etc. filed.
0	Nov 3 1986		ARGUED.

JURISDICTIONAL STATEMENT

84 - 2022
No. 84-



IN THE
Supreme Court of the United States

OCTOBER TERM 1984

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,

—v.—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

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Questions Presented

At issue in this case is the constitutionality of a New York statute that empowers wholesalers to set the minimum retail price of liquor sold by retailers for off-premises consumption. Specifically, the statute requires retailers to resell liquor at a retail price no less than 12 percent above the "bottle price" set by the liquor wholesaler in its unfettered discretion and without state supervision. Since under the statute, this "bottle price" need not, and usually does not, correspond to either the prevailing wholesale price for the item or the retailer's cost, appellant was found to have violated the statute by selling liquor at retail prices which yielded mark-ups in excess of 18 percent.

Two New York intermediate appellate courts invalidated the statute under the Supremacy Clause of the United States Constitution because it sanctioned resale price maintenance in violation of the Sherman Act. Although finding that New York retail "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (10A), the New York Court of Appeals reversed, holding that the statute was saved from invalidation under § 2 of the Twenty-first Amendment. The court below sought to resolve an issue left open by this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The questions presented in this appeal are as follows:

1. Is a state statute that empowers a wholesaler to fix the minimum retail price for liquor in its unfettered discretion and without state supervision invalid under the Supremacy Clause in that it authorizes resale price maintenance in violation of the federal antitrust laws?

2. Is a state retail liquor pricing statute which violates the Sherman Act immune from Supremacy Clause attack under the *Midcal* balancing test when nothing more than legislative

history concerning the statute's purpose is proffered to substantiate the claim that the statute promotes the state's interest in preserving small liquor retailers?

3. Is the claimed state interest in preserving small liquor retailers from the effects of price competition sufficiently related to the core principles underlying the Twenty-first Amendment that it overrides the substantial federal interest in a vigorously competitive economy as embodied in the Sherman Act, particularly where the claimed state interest could be served by less anti-competitive alternatives?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. Appellant has no parent companies, subsidiaries or affiliates as those terms are used in Supreme Court Rule 28.1.

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IN THE Supreme Court of the United States

OCTOBER TERM 1984

No. 84-

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,

—v.—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

Opinions Below

The opinion appealed from of the State of New York Court of Appeals is not yet reported (1A-28A). The opinion of the intermediate appellate court—the Supreme Court of the State of New York, Appellate Division, First Department—is reported at 102 A.D.2d 607, 478 N.Y.S.2d 615 (1984) (29A-37A). The opinion of the court of initial jurisdiction—the Supreme Court of the State of New York, County of New York, Special Term I—is reported at 119 Misc. 2d 746, 464 N.Y.S.2d 355 (1983) (38A-41A). The Order of Suspension entered against appellant by the New York State Liquor Authority (“SLA”) is not reported (42A-45A), nor is the Hearing Officer’s Report

setting forth the factual findings which underlie the Order of Suspension (46A-48A). Also reprinted in the Appendix hereto is the opinion of an intermediate appellate court—the Supreme Court of the State of New York, Appellate Division, Second Department—in a case consolidated for decision with the instant case in the Court of Appeals. *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*, 102 A.D.2d 240, 478 N.Y.S.2d 318 (1984) (49A-57A).

Jurisdiction

Appellant 324 Liquor Corp., d/b/a Yorkshire Wine & Spirits, appeals from the final judgment of the State of New York Court of Appeals holding that New York Alcoholic Beverages Control Law, § 101-bb (McKinney 1970 & Supp. 1984-85) (“Section 101-bb”), is immunized by § 2 of the Twenty-first Amendment from attack under the Supremacy Clause of the United States Constitution as in conflict with Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

The opinion of the State of New York Court of Appeals was handed down on April 2, 1985. The Court of Appeals reversed the decision of the Appellate Division, First Department, and reinstated the judgment of the Supreme Court, New York County, dismissing appellant’s petition to set aside the Order of Suspension.

Notices of appeal to this Court were timely filed on May 24, 1985 with the court possessed of the record in this case (Supreme Court, New York County) and on May 25, 1985 with the court from whose judgment this appeal is taken (New York Court of Appeals) (58A-61A).

This appeal is being docketed in the Court within 90 days of the decision of the Court of Appeals below. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2).

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the Supremacy Clause of, and § 2 of the Twenty-first Amendment to, the United States Constitution; Section 1 of the Sherman Act, 15 U.S.C. § 1; a New York statute, N.Y. Alco. Bev. Cont. Law, § 101-bb; a regulation promulgated by the SLA, N.Y. Admin. Code tit. IX, § 65.4 (1980); and Bulletin 471 issued by the SLA. These constitutional, statutory and regulatory provisions are reproduced at 62A through 73A.

Statement of the Case

1. *The Parties.* Appellant is a New York corporation with its principal place of business in New York City. Pursuant to a liquor license granted by the SLA, appellant operates a retail liquor store, selling liquor and wine to the general public for off-premises consumption.

The appellees are the Commissioners of the SLA appointed by the Governor of the State of New York. Created under the provisions of New York’s Alcoholic Beverage Control Law (the “ABC Law”), the SLA is responsible for administering New York’s laws governing the distribution and sale of alcoholic beverages.

2. *The ABC Law.* New York has established a three-tier liquor distribution system in which manufacturers, wholesalers and retailers are subject to different pricing requirements. Only the provision relating to retail pricing of liquor is at issue in this case.¹

¹ Manufacturers are required to file monthly schedules with the SLA containing their prices to wholesalers. A manufacturer may set prices in these schedules at any level desired, so long as it files an affirmation with the SLA stating that the prices reflected in the schedule are no higher than the lowest prices charged to wholesalers in any other state. ABC Law, § 101-b[3][a], [3][d].

Under the ABC Law, wholesalers are required to file monthly schedules with the SLA.² In the first schedule after a wholesaler has acquired a particular brand of liquor, it sets both a "case price" and a "bottle price" for that brand. *Id.*, § 101-b[3][b] (67A). Thereafter, in any given monthly schedule, a wholesaler may, without restriction or state supervision, reduce its case and bottle prices by means of a so-called "post off."³

3. *The Challenged Provision.* Section 101-bb authorizes liquor wholesalers to establish minimum retail prices and prohibits retailers from reselling below the retail prices established by the wholesalers. Specifically, Section 101-bb[2] prohibits retailers from selling below a minimum retail price determined by applying a 12 percent minimum mark-up to the "bottle price" set by the wholesaler for that month (64A-65A). The "bottle price" on file at the time of the retail sale serves as the base from which the wholesaler computes the minimum retail price regardless of whether the retailer has purchased the item in question at a lower price.

Under Bulletin 471 promulgated by the SLA in 1973, when a wholesaler posts off (i.e., reduces) its case price in any given month, it need make no corresponding reduction in its bottle price.⁴ Bulletin 471 was specifically upheld under Section

2 The constitutionality of the price posting provisions relating to liquor wholesalers is not at issue here. Thus, this case is distinguishable from *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985), where the Second Circuit rejected an antitrust challenge to the provisions of the ABC Law requiring that wine and liquor wholesalers file their monthly prices in the month preceding their effectiveness and then adhere to the scheduled prices for the full month. ABC Law, § 101-b[3],[4] (*reproduced in part* at 67A-69A).

3 Under SLA Rule 16, the "bottle price" multiplied by the number of bottles in the case "must exceed the case price by [a "breakage" surcharge of] approximately \$1.92." N.Y. Admin. Code tit. IX, § 65.4(e) (1980) (70A).

4 Bulletin 471 expressly authorizes a wholesaler who posts off a case price to select from one of three alternatives as to the bottle price: (1) reducing the bottle price by the amount of the post off on the case price

101-bb in the decision below.⁵

Consequently, liquor wholesalers in New York are free to establish as great a differential as they desire between the bottle price and the appropriate fraction of the case price and thereby guarantee retailers mark-ups substantially in excess of 12 percent. Wholesalers, in advertisements appearing in New York liquor industry trade journals, proclaim their ability to produce supracompetitive profits for retailers as a principal marketing inducement. Such advertisements refer to actual retail mark-ups as high as 20 to 30 percent (77A-79A, 82A-86A, 100A). In one advertisement, a wholesaler boasted that it offered an "Exclusive Formula For Extra Profits": "Our 30% markup [that] gives you extra dollars of profit with every order" (83A) (*emphasis supplied*). This wholesaler added: "Our 30% markup is like money in the bank! . . . It's our business to help your business" (*id.*) (*emphasis supplied*). This practice has continued since the decision below (100A).⁶

(after adding a "breakage" surcharge of \$1.92 (see n.3), divided by the number of containers in the case); (2) reducing the bottle price by some lesser amount; or (3) not reducing the bottle price at all (71A-73A).

5 In rejecting appellant's contention below that Bulletin 471 was invalid under Section 101-bb—in that it permitted a wholesaler not to make corresponding adjustments in the bottle price when it posted off the case price—the Court of Appeals held that, under the statute, the wholesaler's bottle price need bear no relation to the case price (19A).

6 The controlling figure for determining the minimum retail price is the bottle price the wholesaler has set for the month in which the item is sold, regardless of when the item was purchased, or the price paid, by the retailer. Under Section 101-bb, wholesalers may, without SLA approval, reduce their legal or post off prices from one month to another and then return to their original prices the following month. As a result, a wholesaler may run a sale in one month and—as a marketing inducement to encourage retailers to stock up—announce in an advertisement in a liquor journal that it will set the minimum retail price for the next month at a substantially higher level and thereby guarantee retailers supracompetitive profits. Wholesalers in fact do so (101A).

4. *Legislative History of Section 101-bb.* Prior to 1964, New York utilized a fair trade pricing scheme for liquor similar to California's wine pricing regime struck down in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).⁷ In 1964, a Commission appointed by the Governor of New York reported—as this Court has observed—that New York consumers were being victimized as a result “of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law.” *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 (1966) (footnote omitted). The Commission concluded that because of fair trade, New York consumers were overpaying for liquor by \$150 million annually. *Id.* at n.9. In response to these findings, the New York Legislature in 1964 repealed fair trade, replacing it with a predecessor version of Section 101-bb.

As enacted in 1964, Section 101-bb fostered competition among liquor retailers. The statute prohibited retailers from selling below “cost” which was derived, under the predecessor of SLA Rule 16 (see n.3), by adding a “breakage” surcharge of 96¢ to the case price, and dividing by the number of bottles in the case. The 1964 version of Section 101-bb did not impose a minimum mark-up.

The vigorous competition which followed enactment of the 1964 version of Section 101-bb did not prove popular with some small liquor retailers. Responding to small retailer complaints that the emphasis on price cutting and price promotions in the industry and the continued prevalence of “lossleader” selling was resulting in a reduction in their number, the Excise Committee of the New York Senate issued a report in 1971 which set forth the following rationale for amending Section 101-bb:

“Since it seems patent that the mass of small retailers are unable to compete with the large volume outlets that have emerged, most appear doomed barring the adoption of

⁷ See ABC Law, § 101-C (McKinney Supp. 1964).

some formula that will permit the co-existence of both types of outlets.”

N.Y. Sen. Excise Comm., Final Report 30 (1971) (quoted in the opinion below, 14A-15A).

This desire to preserve small liquor retailers from continued exposure to the rigors of competition led the New York Legislature in 1971 to amend Section 101-bb to introduce the concept of a minimum 12 percent mark-up. See pp. 4-5, *supra*. With the adoption by the SLA in 1973 of Bulletin 471 (see p. 4 & n.4, *supra*), the transformation of Section 101-bb into a regimen of resale price maintenance was complete.

5. *Section 101-bb As Applied In This Case.* This case arose as a result of a newspaper advertisement—published on June 20, 1981—in which appellant offered to sell certain items below the minimum retail price for those brands established under Section 101-bb (97A). On June 24, 1981, investigators from the SLA purchased from appellant two different brands of liquor in 1.75 liter bottles: a bottle of Smirnoff Vodka for \$11.59, 30¢ less than the minimum retail price established by the wholesaler from whom appellant purchased the product, Star Industries, Inc. (“Star”), and a bottle of Chatham Gin at \$9.45, 20¢ below the minimum retail price established by wholesaler Peerless Importers, Inc. (“Peerless”) (46A-48A).

Each of appellant's retail prices was significantly more than 12 percent above the wholesale price then in effect. In June 1981, Star was selling 1.75 liter Smirnoff Vodka in a case of six bottles at a post off case price of \$58.80, or \$9.80 per bottle (77A-78A, 87A). Thus, appellant's sale of Smirnoff Vodka at \$11.59 produced an actual gross profit to appellant of \$1.79 (*i.e.*, \$11.59 minus \$9.80) and a mark-up of 18.3 percent over the wholesale price. Similarly, appellant's sale of Chatham Gin produced a mark-up of 18.7 percent over the wholesale price.⁸

⁸ In June 1981, Peerless had a post off case price for 1.75 liter Chatham Gin (6 bottles to a case) of \$47.77, or \$7.96 per bottle (78A-79A). Thus, appellant's sale at \$9.45 produced a gross profit of \$1.49 (*i.e.*, \$9.45 minus \$7.96) and a mark-up of 18.7 percent over the wholesale price.

These profitable sales were rendered illegal under New York law only because the wholesaler established a substantial differential between artificially high bottle prices and the appropriate fraction of the case prices.⁹ Neither sale would have violated the statute had the wholesalers not had the ability to control retail prices by setting a phantom bottle price.

6. *The Administrative and Judicial Proceedings Below.* The SLA staff charged appellant with advertising and selling below the minimum retail price established by the wholesalers under Section 101-bb (93A-96A). At the early stages of the suspension proceeding below, appellant raised the claim that Section 101-bb was invalid under the Supremacy Clause in that it authorized conduct in violation of Section 1 of the Sherman Act. The SLA Hearing Officer refused to consider this claim (48A). Thereafter, the SLA—adopting the Hearing Officer's findings and conclusions—ordered that appellant's liquor license be suspended for ten days and that appellant forfeit a \$1,000 bond (42A-45A).

9 Each wholesaler could have computed its bottle price simply by adding the breakage surcharge of \$1.92 to its post off case price and dividing by the number of containers in the case. SLA Rule 16 (70A) (described at n.3).

Had Star done so with regard to the Smirnoff Vodka, its bottle price would have been \$10.12 (*i.e.*, \$58.80 plus \$1.92, divided by 6), the minimum retail price after the 12 percent mark-up would have been \$11.33 and appellant's \$11.59 sale price would have been lawful. But Star—exercising discretion conferred by Bulletin 471 as upheld under Section 101-bb by the court below (see pp. 4-5 & n.5)—chose to set its post off bottle price at the higher figure of \$10.62. The result was a minimum retail price of \$11.89 (after the required 12 percent mark-up on the phantom bottle price), rendering appellant's sale price illegal.

Similarly, Peerless could have set its post off bottle price for Chatham Gin at \$8.28 (*i.e.*, post off case price of \$47.77 plus \$1.92, divided by 6). Had it done so, the minimum retail price would have been \$9.27, with the result that appellant's sale price of \$9.45 would not have violated the statute. Instead, Peerless exercised its discretion to set the post off bottle price at \$8.62. The result was a minimum retail price of \$9.65 (after the 12 percent mark-up), making appellant's sale price illegal.

Appellant sought to have the Order of Suspension set aside in the New York courts on the grounds, *inter alia*, that Section 101-bb, on its face and as applied, was repugnant to the Sherman Act and the Supremacy Clause. The Supreme Court, New York County, denied the petition holding that Section 101-bb did not violate the Sherman Act (38A-41A). The judgment was reversed on appeal. The Appellate Division, First Department held that Section 101-bb sanctioned resale price maintenance in violation of the Sherman Act and was not immunized from antitrust attack under the "state action" doctrine (29A-37A). On appeal to the State of New York Court of Appeals, the case was consolidated with a decision in which the Appellate Division, Second Department, had concluded that Section 101-bb authorized *per se* violations of the Sherman Act, and was not saved from invalidation by § 2 of the Twenty-first Amendment (49A-57A).

On April 2, 1985, the Court of Appeals reversed in a consolidated opinion. The court below purported to resolve a question left open in *Midcal*, *i.e.*, "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy" (13A) (*quoting* 445 U.S. at 113-14). It ruled that Section 101-bb embodied a state policy of protecting small liquor retailers from the perceived evils of price competition (15A-17A),¹⁰ and that this state interest prevailed over the "generalized concerns of the Sherman Antitrust Act" (16A). The court below therefore held that the Twenty-first Amendment shielded Section 101-bb from antitrust attack.

Having concluded that the Twenty-first Amendment insulated the New York statute from antitrust challenge, the Court of Appeals considered it "unnecessary to determine whether

10 The Court of Appeals did not find that the statute served any state interest in temperance; to the contrary, the court noted the determination of the commission which had proposed the 1964 version of Section 101-bb that a statute which provides for high retail prices does *not* promote temperance (16A n.2).

Section 101-bb violates the antitrust laws" (8A). In attempting under *Midcal* to balance federal and state interests, however, the court below found that "the state policy" allegedly served by Section 101-bb—"to maintain extensive retail outlets" and thereby "protect consumers"—was "consistent with the federal [antitrust] statutes" (17A).

The Questions Are Substantial

New York's highest court has decided federal questions of substantial importance in ways that dangerously misconstrue the meaning of the federal antitrust laws and misapply the teachings of the Court's opinion in *Midcal* on how to balance state and federal interests involving the Twenty-first Amendment. The conclusion below that a state law unquestionably authorizing *per se* violations of the Sherman Act, and expressly designed to protect small retailers from vigorous competition, is consistent with the federal antitrust laws is clearly erroneous. The further conclusion—that a challenged state statute may be found to be effectively serving a state interest purportedly protected by the Twenty-first Amendment on the basis of a statement in the legislative history that an earlier statute was not serving that interest—effectively reads the substantiation requirement of *Midcal* out of Twenty-first Amendment jurisprudence.

Finally, the decision below wrongly decides the question left open in *Midcal*. The strong federal policy of vigorous competition far outweighs any state interest in preserving small retailers from the effects of price competition. To the extent that such a state interest seeks to shield retailers from *predatory* practices of competitors, it could be served amply by less anti-competitive alternatives. And to the extent that the state seeks to preserve small retailers from *non-predatory* pricing practices, the claimed state interest clearly is not at the core of the Twenty-first Amendment.

I. Because It Permits The Wholesaler To Fix Retail Prices Without Any State Involvement, Section 101-bb Sanctions Per Se Violations Of The Sherman Act

In *Midcal*, the Court expressly held that Section 1 of the Sherman Act is violated when a state, by statute, authorizes persons operating at one level of distribution of alcoholic beverages to dictate the prices charged by persons operating at another level without the direct involvement or supervision of the State. Because Section 101-bb permits the wholesaler in its unfettered discretion to control retail liquor prices, the New York statute clearly violates the Sherman Act.¹¹

Midcal involved a California statute that empowered producers of wine to fix the prices to be charged by wholesalers by, *inter alia*, filing resale price schedules with the state. 445 U.S. at 99. Wholesalers were prohibited from reselling below the prices fixed by the producer in the schedules. *Id.* After noting that resale price maintenance is *per se* unlawful, the Court held that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act [in that a] wine producer holds the power to prevent competition by dictating the prices charged by wholesalers." *Id.* at 103 (citations omitted).¹² Because "[t]he State d[id] not monitor

11 This Court unquestionably has jurisdiction to decide the question of whether Section 101-bb violates the antitrust laws even though the Court of Appeals did not decide the issue. The failure of a state's highest court to resolve an issue does not deprive this Court of jurisdiction over that issue where the lower courts in the case have explicitly decided the question. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.14 (1981); *cf. Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2699 (1984). Both the New York Supreme Court and the Appellate Division, First Department, expressly resolved whether Section 101-bb violates the Sherman Act. See p. 9, *supra*.

12 Long before *Midcal*, the Court had clearly held that a liquor wholesaler commits a *per se* violation of the Sherman Act when it imposes resale price maintenance. *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 386 (1950).

market conditions or engage in any 'pointed reexamination' of the program," the Court held that "[t]he [national] policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Id.* at 106 (footnote omitted).

Section 101-bb is substantively indistinguishable from the California resale price maintenance statute struck down in *Midcal*. Under the New York statute, the wholesaler establishes two distinct prices—a case price and a phantom bottle price—which need bear no relation to each other. See pp. 4-5, *supra*. By pinning retail prices to a 12 percent minimum mark-up over the phantom bottle price set by the wholesaler, Section 101-bb effectively grants to the wholesaler "the power to prevent competition by dictating the prices charged by" the retailer. *Midcal*, 455 U.S. at 103. Although the New York statute contains the word "cost" (defined as 12 percent above the bottle price),¹³ its purpose and effect are no different than that of California's less cleverly disguised restraint: each permits a person operating at one level of distribution to control the prices charged when its customers resell the product.¹⁴

Nor can the conclusion that Section 101-bb imposes resale price maintenance be avoided by the fact that the statute is cloaked as a state-mandated 12 percent minimum mark-up statute. Under true minimum mark-up statutes, the wholesaler determines only its own invoice price and the state commands that the retailer not resell at a resale price less than the wholesaler's actual invoice price plus some minimum mark-up.¹⁵

13 Considering that the two transactions at issue in this case occurred at prices that more than 18 percent above the wholesale price then in effect (see p. 7, *supra*), no serious claim can be made that Section 101-bb is intended to prohibit below-cost sales.

14 Because Section 101-bb authorizes vertical price restraints, this case is governed by the Court's opinion in *Midcal*, rather than its holding concerning vertical nonprice restraints in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

15 For this reason, lower courts have held that alcoholic beverage minimum mark-up statutes do not violate the Sherman Act. *Serlin Wine &*

New York's retail pricing scheme operates very differently. The record in this case demonstrates that Section 101-bb gives wholesalers the power to control retail prices, as even the court below recognized (9A-10A). Because each wholesaler involved exercised the discretion conferred by the statute to set the bottle price at levels considerably higher than the appropriate fraction of the case price, appellant violated a statute which purportedly establishes a 12 percent minimum mark-up by selling liquor at retail prices which yielded actual mark-ups in excess of 18 percent. See pp. 7-8, *supra*.

Indeed, the record makes crystal clear that New York wholesalers vie in manipulating bottle and case prices so as to produce the largest artificial mark-ups possible for their retailer customers. Wholesalers publish advertisements in trade journals trumpeting the fact that they have established minimum retail prices at levels that guarantee retailers a return of 20 to 30 percent over actual cost (77A-79A, 82A-86A). Plainly, New York consumers are overpaying by millions of dollars for the liquor they purchase at retail as a result of Section 101-bb.¹⁶ Thus, the "vertical control" conferred upon wholesalers by the statute has "destroy[ed] horizontal competition as effectively as if [retailers] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'"¹⁷ A clearer violation of Section 1 as applied in *Midcal* can scarcely be imagined.¹⁸

Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936, 939 (D. Conn.), *aff'd sub nom.*, *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *Baseline Liquors v. Circle K Corp.*, 630 P.2d 38, 45 (Ariz. Ct. App. 1981).

16 Cf. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 39 n.9 (under the liquor fair trade statute in effect prior to 1964, New York consumers overpaid by \$150 million annually).

17 *Midcal*, 445 U.S. at 103 (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

18 It was argued in the court below that no contract, combination or conspiracy among private parties could be found because under Section 101-bb it is the state (and not a private party) that requires that the retailer charge no less than 12 percent above the wholesaler's bottle price. Brief for Appellant, 14 (adopting Brief for Appellant in *J.A.J. Liquors*, 6-15). The short answer to this argument is that the same could be said of the California

In correctly rejecting New York's claim that Section 101-bb was immunized from antitrust challenge under the "state action" doctrine (9A-10A), the Court of Appeals applied the two-pronged test set forth by this Court in *Midcal* and subsequent cases.¹⁹ Specifically, the Court of Appeals held that although the first prong of the test was satisfied (in that the challenged activity was pursuant to a "clearly articulated" state policy), the second prong was not since Section 101-bb authorized wholesalers to set retail liquor prices without supervision or review by the state (10A). Under *Midcal*, New York—which does not actively "monitor market conditions or engage in any 'pointed reexamination' of the prices set by wholesalers"—cannot thwart the national "policy favoring competition" merely by casting this "gauzy cloak of state involvement over" the wholesaler's "price fixing arrangement." See *Midcal*, 445 U.S. at 106.²⁰

wine pricing arrangement struck down in *Midcal*: it too involved a statute which allowed a seller to control its customer's retail prices with the state mandating that retailers adhere to those prices. 445 U.S. at 105. In any event, the record in this case demonstrates that retailers are purchasing from wholesalers who advertise that they can guarantee artificially high markups by virtue of their power to control minimum retail prices (77A-79A, 82A-86A, 100A). This is unquestionably sufficient to satisfy the requirement established by the Court in vertical price fixing cases that "the [retailer] communicate its acquiescence or agreement, and that this [is] sought by the [wholesaler]." *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1471 n.9 (1984).

19 *Midcal*, 445 U.S. at 105; *Hallie v. Eau Claire*, 105 S. Ct. 1713, 1717 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1727 (1985).

20 The court below distinguished this case from the Second Circuit's decision in *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981). It distinguished Section 101-bb from the true minimum mark-up law upheld in *Morgan* since that law—in contrast to Section 101-bb—provided for direct state supervision of the minimum mark-up to be imposed and left the wholesaler with no discretion in setting the minimum retail price. *Id.* at 355-56 & n.2. This case is similarly distinguishable from other lower court decisions upholding true minimum mark-up statutes. See *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 646 (N.D. Ohio 1982); *Walker v. Bruno's Inc.*, 650 S.W.2d 357, 360-66 (Tenn. 1983); *George W. Cochran Co. v. Comptroller*, 292 Md. 3, 11, 437 A.2d 194, 198 (1981).

II. The Court Of Appeals' Conclusion That Section 101-bb Is Consistent With The National Policy As Embodied In The Antitrust Laws Favoring A Vigorously Competitive Economy Constitutes Plain Error

Although it did not expressly consider the unlawfulness of Section 101-bb under the Sherman Act, the Court of Appeals, in applying the *Midcal* balancing test, found the underlying purposes of the two statutes to be consistent. This aspect of the decision below is plainly and dangerously erroneous. Because Section 101-bb authorizes restraints of trade in order to insulate the retail sale of liquor in New York from the rigors of price competition, it flies in the face of the Sherman Act.

The Court has long recognized that the fundamental premise underlying the Sherman Act is that consumer welfare is maximized by the operation of free, unrestricted and vigorous competition. The Court has stated:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy has long been faith in the value of competition."

National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); accord *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition").

As the Court has recognized, attempting to justify a price restraint by asserting some "potential threat that competition poses to the public . . . is nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers v. United States*, 435 U.S. at 695. For this reason, the Court "has never accepted [the] argument" that a "restraint on price competition ultimately inures to the

public benefit." *Id.* at 693-94. To the contrary, the Court has repeatedly held price fixing to be *per se* unlawful regardless of the reasonableness of the prices established and irrespective of the good motives that led to adoption of the practice. The Court has stated:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-222 (1940).

This recognition that Congress has placed price-fixing arrangements "beyond the pale" has led the Court to reject all attempts to defend against charges of price fixing on the basis that unrestricted competition will produce anticompetitive results or other socially undesirable effects.

Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here . . . the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Id. at 218.²¹

In finding the purposes of Sections 1 and 101-bb to be consistent, the Court of Appeals accepted the justification of a price fixing arrangement as necessary to avoid a "competitive abuse." Specifically, the court below recognized that the underlying purpose of Section 101-bb was to preserve small retailers from price competition from larger retailers. It found that the lower prices offered by large retailers—although temporarily beneficial to consumers—ultimately could prove detrimental in that they:

threaten[ed] to drive small retailers out of business and consolidat[e] control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers and market competition generally.

(17A). This desire—to preserve through resale price maintenance inefficient competitors whose continued existence was purportedly jeopardized as a result of vigorous price competition—simply cannot be reconciled with the Court's construction of Section 1.²²

21 Although the above-cited cases involved horizontal price fixing, they apply with equal force to vertical price fixing—which the Court has also held to be *per se* illegal because it no less effectively destroys horizontal competition. See *Midcal*, 445 U.S. at 103 (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. at 407).

22 New York's purported concern with preventing the establishment of an oligopolistic retail liquor market is inherently implausible. Because New York law restricts liquor licensees to the operation of a single store which may sell no products other than wine and liquor (ABC Law, § 63 (McKinney 1970 & Supp. 1984-85)), small retailers are not confronted with competition from large chain stores which are capable of predatory pricing in some markets by virtue of higher profits they obtain in other, less competitive markets. In any event, all that is required for entry into the retail liquor business in New York is a commercial lease and a liquor license. With barriers to entry so low, large retailers—if ever successful in driving small retailers out of the market—would, as soon as they attempted to raise their prices to oligopolistic levels, find the market flooded with a stream of new entrants who would drive prices back down. See III P. Areeda & D. Turner, *Antitrust Law* § 711b (1978).

If left standing, the holding below that price fixing in response to vigorous price competition "is consistent with the federal [antitrust] statutes" (17A) would seriously undercut the Sherman Act's fundamental antipathy to price restraints. Only reversal can vindicate the Sherman Act's *per se* prohibition of vertical price fixing.

III. The Twenty-First Amendment Does Not Immunize Section 101-bb From Invalidation Under The Sherman Act

The Court has held that when a state liquor statute which violates the federal antitrust laws is defended under § 2 of the Twenty-first Amendment, the competing federal and state interests must be balanced to determine "after careful scrutiny" which interest should prevail.²³ In upholding Section 101-bb, the Court of Appeals held that the state's interest in preserving small retailers from the effects of price competition prevailed over the "generalized concerns of the Sherman Antitrust Act" (16A). Because the court below grossly undervalued the federal interest in a competitive economy and substantially overvalued the state interest in preserving small retailers, its decision is clearly erroneous.

1. The Federal Interest is Both Specific and Directly Implicated in this Case

In *Midcal*, the Court made plain that the federal interest in preventing vertical price fixing—and thereby promoting a competitive, efficient economy—is "important," "substantial" and "undoubted." 445 U.S. at 110, 111, 114. The Court also stated:

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom

²³ *Midcal*, 445 U.S. at 110. The Court applies the same balancing test to state liquor laws that conflict with the dormant Commerce Clause. *E.g.*, *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom."

Id. at 110 (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)). This fundamental interest in a competitive economy is directly and substantially contravened by New York's authorization of price restrictions by private parties that are *per se* illegal under the Sherman Act. See pp. 11-18, *supra*. Thus, the court below plainly erred in finding that this case involved only the "generalized concerns of the Sherman Antitrust Act" (16A).

2. New York Has Failed to Substantiate its Claim that Section 101-bb Preserves Small Retailers

In ruling that the Twenty-first Amendment bars application of the federal antitrust laws to New York's statute, the Court of Appeals accepted New York's claim that Section 101-bb was necessary to sustain small liquor retailers. Since no evidence in the record substantiates this claim, the New York statute cannot survive under the *Midcal* balancing test.

California had asserted in *Midcal* that its statute authorizing wine producers to engage in resale price maintenance was necessary to protect the state's interests in temperance and preserving small retailers. The Court rejected this claim, noting that "[n]othing in the record in this case suggests that the wine pricing system helps sustain small retail establishments," and that the system's adherents had not "demonstrated that the program inhibits the consumption of alcohol by Californians." 445 U.S. at 113. For these reasons, the Court stated:

We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. *The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.*

Id. at 113-14 (emphasis added). This principle that "unsubstantiated state concerns" do not outweigh "the goals of the Sherman Act" applies with equal force in this case.

As in *Midcal*, there is simply no evidence in the record of this case that Section 101-bb, in the 14 years since its amendment, has operated to assure the economic survival of small liquor retailers.²⁴ The Court of Appeals' conclusion that the instant case is distinguishable from *Midcal* was based solely on the New York Senate Excise Committee study (see pp. 6-7, *supra*) which stated that, when vigorous competition had prevailed in New York between 1964 and 1971, the existence of small liquor retailers had been threatened (14A-15A). Although the Excise Committee, by recommending amendment of the statute in 1971, purportedly sought to preserve small retailers, the Committee—prior to amending the statute in 1971—obviously could not, and did not, conclude that the amended statute was *operating* to preserve small retailers.

The conclusive effect given by the court below to the Excise Committee's view of the purpose of the statute cannot be squared with the *Midcal* substantiation requirement. The Court in *Midcal* agreed with an earlier California Supreme Court decision holding that California had failed to substantiate its claim that its liquor pricing statute was necessary to preserve small retailers from predatory pricing. 445 U.S. at 112-13 (citing *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978)). Both the Court in *Midcal* and the California Supreme Court in *Rice*—in the absence of direct proof that resale price maintenance was preserving small retail establishments—accepted the validity of a Library of Congress study made at the time of repeal of the federal fair trade exemption²⁵ which

24 Preservation of small retailers is the only state interest asserted. New York does not, and cannot, assert that Section 101-bb promotes the state interest in inhibiting consumption of alcoholic beverages. Indeed, the Court of Appeals, in its opinion below, noted the conclusion of a 1964 legislative study that state laws which establish artificially high prices through vertical price fixing do not promote temperance (16A n.2). This Court has relied upon the same study to support the same conclusion. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 (1966).

25 Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (repealing the Miller-Tydings Act, Pub. L. No. 73-314, 50 Stat. 693 (1937)).

concluded that the number and growth of small retailers were greater in states that allowed free trade than in those which sanctioned vertical price fixing.²⁶

The court below sought to distinguish *Midcal* and *Rice* on the ground that the New York Legislature had responded to the perceived state interest in preserving small retailers after the New York Senate Excise Committee's report whereas the California Legislature had made no such finding (see 15A). Surely, this is a distinction without a difference.²⁷ The decision below is totally devoid of any evidence or rationale to support the view that the New York retail liquor business is so unique that it should be conclusively presumed that retail price maintenance is necessary to serve the state's interest in protecting small retailers, when this Court rejected a similarly unsubstantiated claim in *Midcal* and Congress concluded that vertical price fixing does not in fact serve this interest generally.²⁸ Since the only publicly available data indicate that the number of retail liquor stores in New York has in fact continued to decline since the 1971 amendment of Section 101-bb (99A), the court below clearly erred in concluding that the New York statute served the state interest in preserving small retailers.

26 *Midcal*, 445 U.S. at 112-13, and *Rice*, 21 Cal. 3d at 445-46, 579 P.2d at 493-94, 146 Cal. Rptr. at 595 (both citing S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 1569, 1571 (where the study's conclusion is set forth; in repealing the federal fair trade exemption, Congress also accepted this conclusion)).

27 When this Court has balanced state and federal interests in non-liquor cases involving challenges to state laws under the dormant Commerce Clause, it has been unwilling to accord substantial weight to asserted—and undeniably vital—state interests in safety and health if those assertions are supported solely by statements of legislative *purpose*. Instead, the Court has required a showing that the challenged state statute has had the *effect* of serving the asserted state interest. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670, 671 (1981) (plurality opinion); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-44 (1978); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). In light of *Midcal* there is no basis to require less in the present context.

28 See pp. 20-21 & n.26, *supra*.

3. Any State Interest in Protecting Small Retailers from Predatory Pricing Could Be Served Amply By Less Anti-Competitive Alternatives

The court below upheld Section 101-bb as necessary to preserve small retailers from "the predatory pricing practices of large discount dealers" including "the continued employment of 'lossleader' selling" (14A). But the court below ignored the fact that this state purpose could easily have been better served by any of a number of more narrowly drafted statutes that did not sanction *per se* violations of the Sherman Act.

New York from 1964 to 1971 had a statute on its books which did not mandate a minimum mark-up or permit the use of a phantom bottle price. See p. 6, *supra*. If that statute was not effective in prohibiting predatory pricing practices and lossleader sales (as the New York Senate Excise Committee in 1971 and the Court of Appeals below believed), New York could easily have adopted a statute of general application—or one specifically dealing with retail liquor sales—expressly prohibiting the practice of lossleader selling while outlawing other types of predatory pricing as unfair business practices.²⁹ New York also could have enacted a statute of general application prohibiting below cost sales while defining "cost" in terms of actual cost.³⁰ Alternatively, New York, in revising Section 101-bb, could have adopted a more stringent definition of "cost" so as to more effectively prohibit sales by liquor

29 The California Supreme Court in *Rice* noted that California had enacted such a statute of general application. 21 Cal. 3d at 457 n.24, 579 P.2d at 493 n.24, 146 Cal. Rptr. 602 n.24. New York has no such statute. 1A R. Callman, *The Law of Unfair Competition, Trademarks and Monopolies*, § 7.02 at n.9 (4th ed. 1981).

30 Over 30 states have enacted statutes which seek to prohibit below-cost sales. These statutes are compiled in 1A R. Callman, § 7.02 at n.9. "Cost" is usually defined as "invoice" or "replacement" cost. *Id.*, § 7.13 at 31. New York has no such statute of general application. *Id.*, § 7.02 at n.12.

retailers at prices below actual cost.³¹ Any of these possible courses would have eliminated the problem of predatory pricing practices and lossleader selling without undercutting the federal policy favoring a competitive economy.

The lower courts, in applying the *Midcal* balancing test, have invalidated state laws when the asserted state interests could be served by alternatives less offensive to the federal interests at issue.³² Indeed, the Court itself has affirmed the lower court opinion in *Midcal* and indicated approval of the California Supreme Court's opinion in *Rice* when both opinions rejected Twenty-first Amendment claims because, *inter alia*, the asserted state interests could have been served by less anti-competitive alternatives.³³

31 At least four states—Arkansas, Colorado, New Mexico and Pennsylvania—have enacted statutes which seek to prohibit liquor retailers from selling below cost. 1A R. Callman, § 7.02 nn.10 & 11. New York has no such statute. *Id.* at n.12.

32 *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 136 Cal. App. 3d 829, 839, 186 Cal. Rptr. 552, 559 (Cal. Ct. App. 1982), *cert. denied*, 104 S. Ct. 193 (1983) (California price posting statute violates Sherman Act and is not insulated by Twenty-first Amendment); *Loretto Winery Ltd. v. Gazzarra*, 601 F. Supp. 850, 863 (S.D.N.Y.), *aff'd*, 761 F.2d 140 (2d Cir. 1985) (New York statute permitting sales in retail grocery stores of wine products containing only New York grown grapes held violative of the dormant Commerce Clause and not saved by the Twenty-first Amendment).

33 *Rice*, 21 Cal. 3d at 457 n.24, 458, 579 P.2d at 493 n.24, 494, 146 Cal. Rptr. 602 n.24, 603; *Midcal*, 90 Cal. App. 3d at 984, 153 Cal. Rptr. at 760-61; *accord United States Brewer's Ass'n v. Healy*, 104 S. Ct. 265 (1984) (mem.), *aff'g* 692 F.2d 275, 283-84 (2d Cir. 1984) (state liquor price affirmation statute struck down under the dormant Commerce Clause notwithstanding the Twenty-first Amendment).

Similarly, this Court, in cases not involving alcoholic beverages, has consistently invalidated state laws that offend the negative implications of the Commerce Clause when there are alternatives available that serve the asserted state interests but are less discriminatory against, or impose less substantial burdens on, interstate commerce. See, e.g., *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373, 376-77 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935).

Rather than dealing directly with the problem of predatory pricing and lossleader sales, New York revised Section 101-bb to provide wholesalers with unfettered discretion to fix retail prices. See pp. 6-7, *supra*. Because the New York statute needlessly offends the Sherman Act, the Court of Appeals erred in concluding that Section 101-bb was saved by the Twenty-first Amendment even assuming *arguendo* that the statute preserves small retailers.

4. Protecting Small Retailers from the Effects of Non-predatory Price Competition is not at the Core of the Twenty-First Amendment

Had New York been able to demonstrate that resale price maintenance has the effect of preserving small retailers whose existence is imperiled by the effects of vigorous (but non-predatory) price competition, this case would have raised the issue that the Court expressly left unresolved in *Midcal*: whether the state interest in preserving small retailers is so central to the core concerns of the Twenty-first Amendment that it outweighs the fundamental federal interest in a competitive economy. 445 U.S. at 113-114. The Court of Appeals, in holding that the state interest prevailed, ignored decisions of this Court subsequent to *Midcal* which clearly require a contrary result.

The Court since *Midcal* has held that when a state liquor statute conflicts with a federal statute adopted pursuant to congressional power to regulate interstate commerce, the state interests "implicated" by the state statute must be "so closely related to the powers reserved by the Twenty-first Amendment that the [state statute] may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2708 (1984); accord *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984) (same standard applies when balancing interests under the dormant Commerce Clause and the Twenty-first Amendment).

In *Capital Cities*, the Court rejected a claim that a state statute barring cable television stations from transmitting wine advertisements generated by out-of-state broadcasters impli-

cated the state's interest in promoting temperance sufficiently to override the federal interest in a uniform, national communications policy. Because the prohibition applied only to wine advertisements transmitted on cable television from out-of-state while permitting advertisements for other alcoholic beverages in all media, the Court found that the state interest in temperance was not as substantial as would have been the case had the state sought to promote that interest less selectively. *Id.* at 2709.

In light of the decisions of the Court of Appeals below and in an earlier case, New York is similarly pursuing its asserted interest selectively. While the court below considered the preservation of small retailers to be so substantial as to justify Section 101-bb (17A), it had previously concluded that the same state interest was insufficient to uphold a New York statute that authorized wine wholesalers to fix minimum retail prices even though wine sales are a large portion of a liquor store's business.³⁴ Moreover, the state does not authorize retail price maintenance for beer. Under *Capital Cities*, this less than across-the-board pursuit of a state interest cannot override the strong federal interest involved in this case.

The contention that a state statute sanctioning economic protectionism implicates core Twenty-first Amendment concerns cannot survive the Court's decision in *Bacchus Imports*. There, the Court struck down under the dormant Commerce Clause a state statute which had the effect of favoring in-state brandy producers over out-of-state competitors. The Court held that a state's interest in developing a vigorous local liquor industry constituted mere "economic protectionism" that was not sufficiently closely related to "the principles underlying the Twenty-first Amendment" for the discriminatory tax to find insulation thereunder. *Id.* at 3058. Where a state statute violates a "central tenet of the Commerce Clause" and is "not supported by a clear concern of the Twenty-first Amendment," the Court held the statute must fall. *Id.* at 3059.

³⁴ See *Mezzetti Associates, Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791, 432 N.Y.S.2d 372 (1980).

The reasoning of *Bacchus Imports* requires invalidation of Section 101-bb.³⁵ Just as antipathy to local protectionism is basic to the dormant Commerce Clause, hostility to price restrictions is a "central tenet" of the Sherman Act. Moreover, preserving small retailers from vigorous competition from larger competitors is no more "a clear concern of the Twenty-first Amendment" than is protecting in-state liquor producers from out-of-state competition.

Conclusion

For the reasons set forth above, the decision below should be summarily reversed or, alternatively, the Court should note probable jurisdiction and set the case down for briefing and oral argument.

Respectfully submitted,

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Dated: June 28, 1985

35 The Court has repeatedly recognized that Congress, in enacting the Sherman Act, exercised to the full extent its Commerce Clause power. *E.g.*, *United States v. American Building Maintenance Industries*, 422 U.S. 271, 278 (1975); *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945) (holding that Congress could consistently with the Commerce Clause outlaw a vertical price fixing conspiracy among liquor manufacturers, wholesalers and retailers); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

APPENDIX

APPENDIX A

OPINION OF THE STATE OF NEW YORK COURT OF APPEALS
(APRIL 2, 1985) (___ N.Y.2D ___)

COURT OF APPEALS
STATE OF NEW YORK

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No.74

In the Matter of J.A.J. LIQUOR STORE, INC.,
Respondent,
v.

NEW YORK STATE LIQUOR AUTHORITY,
Appellant.

No. 75

In the Matter of 324 LIQUOR CORP.
d/b/a YORKSHIRE WINE & SPIRITS,
Respondent,

v.
EDWARD J. McLAUGHLIN, et al.,
Appellants.

(74) & (75)

ROBERT ABRAMS, Attorney General (August L. Fietkau, Peter H. Schiff, Frederick K. Mehlman, and Richard G. Liskov of counsel) *for appellant*.

SEYMOUR S. HOWARD, Jericho, *for respondents*.

VICTOR FEINGOLD, New Rochelle, for Wine, Liquor & Distillery Workers, et al. *amicus curiae*.

SIMONS, J.

Section 101-bb of the Alcoholic Beverage Control Law prohibits the retail sale of liquor for off-premises consumption at less than "cost"—the price per bottle offered by a wholesaler to a retailer plus a 12% mark-up on that price. Petitioners, retail liquor store licensees, concede that they have sold liquor below this statutory "cost", but contend that section 101-bb sanctions retail price maintenance in violation of the Sherman Antitrust Act (US Code, tit 15, § 1, *et seq.*). They contend, therefore, that respondent's charges and findings of guilt based on these sales should be annulled as unlawful. The Appellate Divisions reviewing these proceedings agreed and, in each case, rejected respondent's contentions that the statute was protected by the state action exception to antitrust enforcement under *Parker v Brown* (317 US 341) or by application of the Twenty-First Amendment. Subsidiary issues are also involved. In *J.A.J. Liquor Store*, the court construed the scope of the prohibition on engaging in another business on licensed premises set forth in Alcoholic Beverage Control Law § 63(4) and found no substantial evidence petitioner had violated it and in *324 Liquor Corp.*, the court reviewed the validity and potential anticompetitive effect of Bulletin 471 and invalidated it. We hold that section 101-bb is a proper exercise of the State's power under the Twenty-First Amendment which does not conflict with the Sherman Act and that in *J.A.J. Liquor Store* there was no substantial evidence

of a violation of section 63(4) and we therefore modify the judgment of the Appellate Division, Second Department. We reverse the order of the Appellate Division, First Department in *324 Liquor Corp.*

I

J.A.J. Liquor Store

Petitioner J.A.J. Liquor, Inc. is a licensed retailer of liquor for off-premises consumption in Hicksville, New York. On February 20, 1980 respondent State Liquor Authority, the agency responsible for administering the ABC Law, instituted a proceeding to cancel or revoke petitioner's license based on the following two charges: first, that petitioner violated ABC Law § 63(4) by engaging in another business on the licensed premises and second, that on January 25, 1980 petitioner violated ABC § 101-bb(2) by selling alcoholic beverages below cost to a State Liquor Authority investigator. Petitioner pleaded not guilty and a statutory hearing was held before a hearing officer designated by respondent.

The evidence adduced at the hearing indicated that respondent's investigators went to petitioner's premises on the date alleged and purchased a bottle of Johnny Walker Red Label Scotch Whiskey for \$9.50 together with a bottle of Bacardi Rum for \$6.09. At the time of the sale, the minimum resale price for those products established pursuant to section 101-bb was \$9.99 and \$6.36, respectively. The evidence supporting the charged violation of ABC law 63(4) was that petitioner sold a stuffed animal to the investigators with a bottle of Black and White Scotch for \$18. Petitioner's president testified that he sold the liquor and stuffed animal as a gift package; that he purchased the stuffed animals for \$8.00 each; that the retail price of the liquor was \$8.00; and, that he paid an additional sum for wrapping paper and bow which accompanied the gift package. He further testified that he had never sold any of the animals separately and would never do so.

Respondent adopted the findings of the hearing officer, sustained the charges and assessed a penalty of a \$2,000 fine

and 20 days deferred suspension. Petitioner then instituted an article 78 proceeding contending that respondent's determination concerning the sales of liquor below cost was unlawful because ABC Law § 101-bb violates the Sherman Antitrust Act and that the determination that it had unlawfully engaged in another business was not supported by substantial evidence. The Appellate Division, Second Department granted the petition, annulled respondent's determination and dismissed the charges. It found that the statutory minimum pricing scheme for liquor embodied in ABC Law § 101-bb was virtually indistinguishable from the parallel retail price maintenance sections for wine invalidated in *California Retail Liq. Dealers v Midcal Aluminum* (445 US 97, 102) and *Matter of Mezzetti Assoc. v State Liq. Auth.* (51 NY2d 761). Following the *Midcal* reasoning, the court concluded that the regulation of liquor sales under section 101-bb is not immune from antitrust legislation under *Parker v Brown* (317 US 341, *supra*) and that the Twenty-First Amendment does not shield the State from the antitrust laws. The court also ruled that respondent's determination that petitioner violated ABC Law § 63(4) by engaging in another business on the licensed premises was not supported by substantial evidence.

324 Liquor Corp.

Petitioner 324 Liquor Corp. was also charged by respondent with violating ABC Law § 101-bb arising from the sale of liquor for off-premises consumption at a price less than cost. A statutory hearing was convened at which the parties stipulated that a Liquor Authority investigator purchased two bottles of liquor at petitioner's premises, a 1.75 liter bottle of Chatham Gin for \$9.45 and a 1.75 liter bottle of Smirnoff's Vodka, 80 proof, for \$11.59, at a time when the minimum consumer retail price was \$9.65 for Chatham Gin and \$11.89 for Smirnoff's Vodka. Respondent sustained the charge and imposed a penalty of 10 days suspension plus a \$1,000 bond forfeiture. Petitioner then commenced an article 78 proceeding to review and annul respondent's determination on the ground that the

minimum retail pricing scheme for liquor violates the antitrust laws. Petitioner also contended that respondent acted *ultra vires* in promulgating its Rule 16 (9 NYCRR 65.4), which requires that the price per bottle must exceed the price per case in which it is contained by \$1.92 divided by the number of bottles in the case, because it lacks the statutory authority to compel wholesalers to add any amount to their prices. Further, petitioner maintains that respondent exceeded its statutory powers by issuing Bulletin 471. That Bulletin permits wholesalers to "post-off" or reduce the legal case price in any month without fully passing through the "post-off" to the consumer on the bottle price. Thus, petitioner alleges that Bulletin 471 allows wholesalers to offer quantity discounts for the benefit of the retailer in excess of those permitted by section 101-b of the ABC Law. Special Term rejected each of petitioner's claims and dismissed the petition. The Appellate Division, First Department reversed and annulled respondent's determination, ruling that section 101-bb was a price maintenance scheme which violated the Sherman Antitrust Act. It further held that Bulletin 471 improperly granted wholesalers the authority to determine if price reductions made during "post-off" periods should be passed through on single bottle prices and thereby encouraged private price maintenance. The court did not reach the issue of whether respondent acted *ultra vires* in promulgating Rule 16.

On these appeals, respondent State Liquor Authority contends that ABC Law § 101-bb does not violate the Sherman Act because the antitrust law condemns concerted action in the nature of "contract[s], combination[s] * * * or conspirac[ies]" which unreasonably restrain trade (15 USC § 1), not minimum mark-up price provisions of state law which do not compel anticompetitive activity. Alternatively, respondent maintains that this issue is not determinative because section 101-bb is exempt from challenge under the "state action" immunity doctrine enunciated in *Parker v Brown* (317 US 341, *supra*), and that it is otherwise protected under the Twenty-First Amendment.

II

The statutory provision in issue on this appeal was originally enacted in 1964 as part of a sweeping revision of our liquor laws based upon recommendations made by a specially appointed Moreland Commission. These statutes attempt to balance price protection for consumers on the one hand and to prevent retail licensees from obtaining unfair advantage over their competitors on the other. The consumers are protected by price affirmation and posting requirements intended to keep New York's prices in line with those of other states. Small retailers are protected by regulations governing minimum pricing, wholesale discounts and other means of obtaining competitive advantage so that the large dealers may not drive the small ones out of business. Thus, at the initial stage in the distribution process, manufacturers and distillers are required to file monthly schedules with the Liquor Authority which include their prices to wholesalers. Each manufacturer or distiller must file with the schedules an affirmation stating that the prices charged are no higher than the lowest prices charged wholesalers in any other state (Alcoholic Beverage Control Law § 101-b, [3], a; [3], d; see *Seagram & Sons v Hostetter*, 384 US 35, affg 16 NY2d 47 [requirement that liquor prices to domestic wholesalers be as low as prices offered elsewhere in the country held not to violate the Supremacy Clause or to conflict with the Sherman Act or the Robinson-Patman Act]; *Brown-Forman Distillers Corp. v State Liquor Authority*, ___ NY2d ___, dec. herewith). Thereafter, the wholesaler is free to fix the prices of the brands without statutory control, but it must also file schedules with the Liquor Authority each month which set forth its "case" and "bottle" price to retailers for all brands it markets (Alcoholic Beverage Control Law § 101-b, [3], [b]). Within ten days after the filing, the Authority must make the schedules or a composite of them available for inspection by other licensees and within three days after the date provided for such inspection, a wholesaler may amend its filed schedule for sales to retailers in order to meet lower competing prices and discounts "provided such amended prices

are not lower and discounts are not greater than those to be met" (Alcoholic Beverage Control Law § 101-b [4]). This is a constitutionally permissible price-posting statute which does not authorize anyone to determine prices which bind others in violation of the Sherman Antitrust Act (see *Matter of Admiral Wine Merchants v State Liq. Auth.*, 61 NY2d 858; *Battipaglia v State Liq. Auth.*, ___ F2d ___ [2d Cir.], Sept. 21, 1984, cert denied ___ US ___).

Exercising its statutory authority to reduce prices to meet competition (see § 101-b [4]), respondent also has issued Bulletin 471 which permits wholesalers to temporarily "post-off" on, or reduce, the case price. They may also "post-off" on the bottle price at the previous list price or at a price which is proportionately equivalent to the reduction in the case price. At the end of the "post-off" period, the wholesaler may return to but not exceed the "legal" maximum price reflected in the schedule filed with respondent.

Finally, section 101-bb, the section challenged on this appeal, provides for a legal minimum retail price. It prohibits retailers selling for off-premises consumption from selling below "cost". The cost or legal minimum retail price, however, is the "bottle price" filed by the wholesaler in the month the retailer makes a sale plus 12% of that "bottle price", a constant which reflects "the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor" (Alcoholic Beverage Control Law § 101-bb [2][b]).¹ Section

1. The section states:

"2. No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

(a) 'liquor' shall mean liquor bearing a brand or trade name, and of like age and quality, which has been duly registered with and approved by the liquor authority pursuant to section 107A of this chapter, and

(b) 'cost' shall mean the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor. As used in this paragraph (b) the term 'price' shall mean

101-bb (3) permits retailers to charge less than cost, however, after obtaining prior written permission from the Liquor Authority and after establishing good cause for doing so. This section was designed to protect small retailers from unfair competition (see Alcoholic Beverage Control Law § 101-bb [1]).

Petitioners specifically challenge the validity of section 101-bb but the implications of this litigation are much broader than the attempt to invalidate that section. If they are successful liquor prices will be deregulated and other statutory provisions designed to protect small retailers from unfair competition such as those specifying the maximum discounts permitted by law (section 101-bb[2][b]), prohibiting wholesalers from granting discriminatory discounts, prohibiting wholesalers from granting free merchandise or other inducements (section 101-b[2][b]; cf. *Matter of Brown-Forman Distillers Corp. v State Liquor Authority*, ___ NY2d ___, dec. herewith), and provisions limiting the credit period afforded to retailers by wholesalers (section 101-a, [2]-[b]) will lose much of their force.

III

Turning to the merits of the appeals, a preliminary determination must be made whether "state action" immunity or the Twenty-First Amendment insulates section 101-bb from challenge under the antitrust laws. If either doctrine applies, the state enactment must be sustained and it is unnecessary to determine whether section 101-bb violates the antitrust laws.

the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred one-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor; except, that where no applicable schedule is in effect the bottle price of the item of liquor shall be computed as the appropriate fraction of the case price of such item, before any discounts, most recently invoiced to the retailer."

A. State action Immunity under *Parker v Brown*

Parker v Brown (317 US 341, *supra*) involved an antitrust challenge to a California statute authorizing collective raisin marketing programs which eliminated pricing competition among producers. In upholding the marketing program, the Supreme Court noted that the challenged restraint derived from statutory command, not from any agreement among private persons, and it held that the federal antitrust laws do not prohibit a state "as sovereign" from imposing certain anti-competitive restraints "as an act of government" (*id.* at 352). Two standards must be met before this state action immunity attaches: first, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; and second, the policy must be "actively supervised" by the state itself (see *California Retail Liq. Dealers v Midcal*, 445 US 97, 105, *supra*). The Appellate Divisions held the immunity inapplicable in the appeals before us because the statutory scheme which permitted liquor prices to be set by wholesalers without any control by the State did not satisfy the active supervision requirement. We agree with those rulings.

In *Midcal* (*supra*), the Supreme Court reviewed a challenge to California's system of resale price maintenance for wine. Under the California statutory scheme, wine producers, wholesalers or rectifiers were required to file fair trade contracts or price schedules with the State, and no licensed wine merchant was allowed to sell wine to a retailer at a price other than that set forth in the filed contract or schedule (Cal. Bus. & Prof. Code Ann., §§ 24862, 24866). The prices were set in the first instance by the producers, wholesalers or rectifiers, and the State exercised no regulatory control over them. In applying the *Parker* criteria, the court found that although the requirement that the restraint be expressed as state policy was satisfied by the statutes themselves, the second requirement of the test had not because the State merely authorized price setting without exercising control or review over the prices established (*Calif. Retail Liq. Dealers v Midcal*, *supra*, pp 105-106). Having determined that no state action antitrust immunity was

available, the court held that California's wine pricing system constituted resale price maintenance which violated of the Sherman Antitrust Act (*id.* p 103).

New York's pricing system for liquor similarly satisfies the first requirement of the test because the state policy of promoting the orderly distribution of liquor is "clearly articulated and affirmatively expressed" in the statute itself (Alcoholic Beverage Control Law § 101-bb, [1]). As with California, however, New York does not actively supervise resale prices under its system of price maintenance. Liquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness.

Connecticut's liquor price maintenance system has been held immune from the Sherman Act under the state action doctrine (*Morgan v Division of Liq. Control*, 664 F2d 353, affg 512 F Supp 936). In contrast to the California and New York statutes, the Connecticut statute creates a tri-partite pricing system by which the manufacturer or out-of-state shipper unilaterally establishes and files its offering price but the State then regulates the mark-ups allowed to the wholesaler and to the retailer. The wholesaler's prices cannot be less than its "cost", which is defined as actual cost from the manufacturer and such charges as transportation, insurance and a minimum mark-up of 11% on hard liquor, 20% on beer, 20% on wine not bottled in Connecticut, and 36% on wine bottled in Connecticut (Conn. Gen. Stat. §§ 30-68, 30-68e, 30-68j), and retailers may not sell below their "cost", which is defined as the retailer's "bottle price" from the wholesaler plus a mark-up of 21.5% on spirits, 28% on cordials, 23% on beer, and 33.3% on wine (Conn. Gen. Stat. § 30-68b, 30-68j). Although the manufacturer's prices are uncontrolled, the *Morgan* court found *Parker's* active supervision requirement satisfied by the Connecticut statute because the State participated in the anti-competitive activity by strictly regulating the "cost" at which both the wholesaler and the retailer could mark-up and sell their products.

B. Twenty-First Amendment

Section 1 of the Twenty-First Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. Section 2 provides that:

"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

The amendment, by its terms, gives the states broad regulatory powers over liquor traffic within their territories and that control "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol" (*California Retail Liq. Dealers v Midcal*, 445 US 97, 107, *supra*; *California v LaRue*, 409 US 109; *Seagram & Sons v Hostetter*, 384 US 35, 42, *supra*; *United States v Frankfort Distillers*, 324 US 293, 299). Because the states have the power to prohibit absolutely the manufacture, sale or possession of intoxicants within their borders, they may permit those acts only under carefully prescribed conditions. "The greater power includes the less[er]" (*Ziffrin, Inc. v Reeves*, 308 US 132, 138). Notwithstanding the "wide latitude" granted them by the Twenty-First Amendment, however, important federal interests have survived its ratification (*Seagram & Sons v Hostetter*, *supra*, 42). Specifically, Congress has retained authority to regulate interstate commerce in liquor under the Commerce Clause (see *Bacchus Imports, Ltd. v Dias*, ___ US ___, 82 L Ed 2d 200, 211-212; *Hostetter v Idlewild Liq. Corp.*, 377 US 324, 332), and that Commerce Clause authority may also be exercised by enforcement of the antitrust laws (*California Retail Liq. Dealers v Midcal Aluminum*, *supra*). There is no bright line dividing the areas of state and federal primacy, "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case" (*Hostetter v Idlewild Liquor Corp.*, 377 US at p 332,

supra). The court must analyze "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail . . ." notwithstanding a conflict between its provisions and federal policies (*Bacchus Imports, Ltd. v Dias*, *supra*, at 212 quoting *Capital Cities Cable, Inc. v Crisp*, ___ US ___, 81 L Ed 2d 580).

This interest analysis was applied in *California Retail Liquor Dealers v Midcal Aluminum*, *supra*, and by the California Supreme Court in *Rice v Alcoholic Beverage Control Appeals Board* (21 Cal. 3d 431). In *Rice*, the California court invalidated a statute establishing resale price arrangements for distilled spirits as in violation of the Sherman Antitrust Act, holding that neither the state action exception nor the Twenty-First Amendment provided a basis to uphold that State's fair trade laws. (Significantly, the California statutes do prohibit sales below cost [see 21 Cal 3d 431, at 458]). In applying interest analysis to determine the applicability of the Twenty-First Amendment, it ruled that the stated purposes of California's liquor price maintenance laws were to promote temperance and orderly market conditions. Reviewing the evidence offered in support of these aims, the court concluded that the law had no impact on temperance and that it adversely affected market conditions. It based its decision in part on a report of the California Senate Committee which stated that the price maintenance system "has resulted in the elimination of any semblance of competition within the industry" resulting in higher retail prices (Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages, vol 1, p 9 [1974]). Thus, the court held that the asserted state interests were not furthered by California liquor price maintenance laws and, in contrast, that the federal policy of promoting competition which underlies the Sherman Act was clearly violated (see *Northern Pacific Ry Co. v United States*, 356 US 1, 4-5). Balancing the strong federal policy against the weakly supported state interests, the court concluded that the federal interest predominated and that the Twenty-First Amendment did not bar application of the Sherman Act.

In *Midcal*, the Supreme Court relied upon the California court's decision in *Rice* and found that the Twenty-First Amendment did not bar application of the antitrust laws to California's wine industry. It explicitly refrained from deciding "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy" (445 US at 113-114; see also *United States v Frankfort Distillers, Inc.*, 324 US 293, 299, *supra* [in which defendants were convicted of illegal price fixing under the Sherman Act because there was no regulatory state act which conflicted with the federal statute] and esp. concurring opn of Frankfurter, J. at pp 300-303).

New York's experience in regulating alcoholic beverages has been markedly different from that of California. The legislative history of section 101-bb forcefully demonstrates that an important reason for its enactment and amendment to its present form was to protect small retailers and the number of retail liquor outlets selling for off-premises consumption. The statute was first enacted following widespread charges of corruption and abuse which prompted a Moreland Commission investigation into irregularities in the administration of New York's Alcoholic Beverage Control laws. At the conclusion of its investigation, the Commission published five Study Papers in which it proposed extensive revision of the existing statutes. The Commission's major findings were that New York consumers suffered from serious price discrimination when compared to liquor consumers in other states and that a severe lack of competition existed in the New York retail market. It proposed that changes be made in the method of regulating retail prices, that more retail licenses be issued for off-premises consumption, that artificial restrictions on the location and transfer of licensed retail stores be eliminated and that inhibiting restrictions on their operation be reduced (for a general background of this history and of the Commission's findings and recommendations see *Seagram & Sons v State Liquor Authority*, 16 NY2d 47, affd 384 US 35, *supra*; *Matter of Hub Wine & Liquor Authority v State Liquor Authority*, 16 NY2d 112; *Matter of Great Eastern Liquor Corp. v State Liquor Authority* of

State of N. Y., 30 AD2d 307, 309, affd 25 NY2d 525; Moreland Commission Report, NY Leg Ann, 1964, pp 484-489; Statement by Governor Rockefeller on April 12, 1984, NY Leg Ann, 1964, pp 403-408). Paradoxically, the principal purposes of the legislation resulting from these proposals and which is now challenged on anti-trust grounds were the same as those underlying the Sherman Act—to promote market competition and protect consumers.

Section 101-bb (L 1964, ch 531) was enacted as a result of these proposals. It expressed the legislative determination that "the declared policy of the state" was to regulate and control the manufacture, sale and distribution of liquor within the state and to "eliminate retail sales of liquor at less than cost" (Alcoholic Beverage Control Law § 101-bb[1]). The validity of the statute was affirmed by this Court and by the Supreme Court (*Seagram & Sons, Inc. v Hostetter*, 16 NY2d 47, affd 384 US 35, *supra*).

By 1971 it had become apparent that further amendment was needed to protect small retailers because hundreds of package stores were being forced out of business by the predatory pricing practices of large discount dealers (see NY Leg Ann, 1971, pp 80-82; cf. *Matter of Safeway Stores v Oklahoma Retailers' Ass'n.*, 360 US 334; *Nebbia v New York*, 291 US 502). The Excise Committee of the New York Senate investigated the situation and found that after the 1964 revisions there was an inordinate and continuing emphasis on price cutting and price promotions in the industry, that the continued employment of "lossleader" selling had resulted in a rapidly accelerating concentration of volume in the hands of a relatively few stores, and that this concentration interfered with the attainment of "normal" competition and threatened the survival of the entire retail economy of the liquor industry. The Committee's Final Report stated:

"Since it seems patent that the mass of small retailers are unable to compete with the large volume outlets that have emerged, most appear doomed barring the adoption of some formula that will permit the co-existence of both

types of outlets. This leaves New York's consumers facing the future prospect of being relatively poorly served only by mass merchandisers" (NY State Leg., Senate Excise Committee, Final Report of the Senate Excise Committee, April 5, 1971 pp 29-30, as quoted in *House of Spirits v Doyle*, 72 Misc 2d 1036, 1040).

These practices produced temporary price reductions to the consumer, but the benefits could prove transitory, threatening to drive small retailers out of business and consolidating control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers and market competition generally. The Legislature responded to this threatened danger by enacting the minimum mark-up amendment to section 101-bb (L 1971, ch 191). It was expressly designed to preserve competition in New York's retail liquor industry by stabilizing the retail market and protecting the economic position of small liquor retailers. We approved the amendment and recognized the important public policy which prompted it when we affirmed *House of Spirits v Doyle* (72 Misc 2d 1036, affd 43 AD2d 880, affd 36 NY2d 815). There have been criticisms of the statute since 1971 and efforts to repeal it, as the dissent notes, but the Legislature has refused to do so and indeed has considered amendments seeking to increase the permitted minimum mark-up (see NYS Legis Rec. and Index 1984, S. 6541).

This history demonstrates New York's commitment to protect its small retailers and the investigative determinations upon which the statutes intended to do so are premised. Having experienced problems in the intrastate retail liquor market, the Legislature exercised its powers under the Twenty-First Amendment to correct them. The statute in question responds to this perceived state interest and is thus distinguishable from the California statutes considered in the *Rice* and *Midcal* decisions. Additionally, we note that New York's history and experience have dictated that if the consumer of alcoholic beverages in this State is to be protected from inflated prices and to enjoy the benefits to be derived from

market competition, then the regulatory provisions in section 101-bb and related sections best serve that purpose.² Inasmuch as those charged with enacting and enforcing the laws in this area of state responsibility have identified the statute as embodying an important public policy that policy should prevail over the generalized concerns of the Sherman Antitrust Act (see *Battipaglia v State Liq. Auth.*, slip opn, p 6443, ___ F2d ___ [2d Cir.], Sept. 21, 1984, cert denied ___ US ___, *supra*).

Matter of Mezzetti Assoc. v State Liq. Auth. (51 NY2d 761, *supra*), which invalidated parallel pricing provisions for wine (Alcoholic Beverage Control Law § 101-bbb) does not require a different result. New York has historically regulated traffic in distilled spirits strictly. Implicit in the brief *Mezzetti* decision, however, was a recognition that the degree of protection New York has accorded its wine industry is not significantly different from that in California as reviewed in the *Midcal* decision. Thus, all liquor distillers and manufacturers must meet statutory affirmation requirements and file price schedules (Alcoholic Beverage Control Law § 101-b[d]), but wine dealers need not file affirmations and they are permitted

2 On the important matter of price regulation, the Commission noted that under the former statute the manufacturer was permitted to fix the price of liquor and the retailer could not sell it for less (former section 101-c of the Alcoholic Beverage Control Law). The assumption behind this law was that high prices promoted temperance. The Commission's studies led it to believe, however, that the assumed favorable relation of high-priced liquor to temperance did not exist (Moreland Comm. Report No. 1, pp 3, 17). The principal benefit from the statutory price provision went to the liquor interests who, after setting their own prices, had them enforced by state investigators. This regulation, the Commission said, served only "to insure profit margins of the various segments of the industry" (Report No. 3, p 19). Moreover, the Commission found gross price discrimination against the New York consumer by the industry. Indeed, it found that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D.C. than the wholesale price in New York (see Report No. 3, pp 5, 6). "For almost every fifth of whiskey that he buys", the Report stated, "the New York consumer pays 50 cents to \$1.50 more than the price at which it is available in at least seven freer price markets." (*id.*, 3).

exceptions to the price schedule requirements (Alcoholic Beverage Control Law § 101-bbb[3][d]). Wineries may sell wine at retail at any time (9 NYCRR 63.6), they may sell in bulk to persons outside the State (Alcoholic Beverage Control Law § 77) and they may manufacture other products and carry on other related business on the licensed premises (Alcoholic Beverage Control Law §§ 77[4]). Indeed, New York recently enacted legislation permitting wine products to be sold in grocery stores (L 1984, ch 502) and broadly expanding the retail sale privileges accorded wineries (L 1984, ch 500-505). Liquor stores enjoy none of these advantages, which evidences a clear recognition by the Legislature that the need to protect wine sellers from unfair competition does not require the intensive regulation and control requirements that the liquor industry generally requires. Indeed, one of the principal arguments in support of the newly enacted wine-marketing bills was that the industry needed economic encouragement through greater deregulation if it was to survive (see Governor's Memorandum, McKinney's Session Laws of New York, 1984, p A-738).

Accordingly, we conclude not only that the state interest in protecting retailers which underlies our statutes is of sufficient magnitude to override the federal policy expressed in the anti-trust laws, but also that the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with the federal statutes. We hold, therefore, that the Twenty-First Amendment shields the State from the provisions of the Sherman Antitrust Act and in view of our holding, that portion of respondent's determination in each case which found petitioners to have violated section 101-bb must be reinstated.

IV

In *J.A.J. Liquor Store*, the Appellate Division concluded that respondent's determination that petitioner had engaged in another business on the licensed premises was not supported by substantial evidence. We agree with that portion of the Appellate Division's decision.

ABC Law § 63(4) provides that "[n]o licensee under this section shall be engaged in any other business on the licensed premises." The statute is intended to prohibit a separate profit generating business. Thus, in *Matter of Anchor Ligs. v State Liq. Auth.* (31 AD2d 812), the court held that there was substantial evidence of a violation of the statute because petitioner ran a complete catering service on the licensed premises. The uncontroverted evidence in this proceeding established that petitioner was not engaged in the business of selling stuffed animals because the animals were sold only as part of gift packages of liquor and the sale of the animals themselves did not generate a profit.

V

In *324 Liquor Corp.*, the First Department viewed SLA Bulletin 471 as giving wholesalers the power to set minimum mark-ups above 12% and it invalidated section 101-bb partially because of that finding. The court also held Bulletin 471 was invalid because its provisions exceeded respondent's authority.

Preliminarily, the Appellate Division erred in using the purported anticompetitive effect of Bulletin 471 as a basis for invalidating section 101-bb. Constitutional problems created by a regulation should be resolved by invalidation of the regulation alone, not invalidation of both the statute and regulation (cf. *Loretto v Teleprompter Manhattan CATV Corp.*, 58 NY2d 143, 154). In addition, the Bulletin is a proper exercise of the Liquor Authority's rule-making power under ABC Law § 101-b(3)(b) and ABC Law § 101-b(4).

Bulletin 471 allows individual wholesalers to decide whether to "post off" reductions on case prices accompanied by corresponding reductions in bottle prices. In some situations, the wholesaler may choose to grant a smaller price reduction on the bottle price, or no reduction at all. This practice is consistent with ABC Law § 101-b(3) which does not mandate any price ratio between scheduled case and bottle prices.

The Appellate Division concluded that the Bulletin is invalid, in part, because it permits a "post-off" on a case which

is not followed by an equivalent "post-off" on a bottle price with the result that a retailer may charge a mark-up in excess of 12%. Bulletin 471 does not authorize such a practice. In re-selling a bottle of liquor which was purchased by the retailer as part of a full case, the minimum mark-up price is derived from the statute by referring to the scheduled bottle price and adding 12%, rather than by dividing the case price by the number of bottles in the case and then adding 12% to each bottle to be individually re-sold. As a result, the "post-off" price of a bottle of liquor is the governing figure, not the case price. A retailer pays the scheduled post-off price regardless of the number of cases or bottles purchased.

Accordingly, in *J.A.J. Liquor Store, Inc. v State Liquor Authority*, the judgment of the Appellate Division should be modified, with costs to appellant, and the matter remitted to Supreme Court, Nassau County with directions to remand to the State Liquor Authority for further proceedings in accordance with this decision and as so modified, the order is affirmed.

In *Matter of 324 Liquor Corp. v McLaughlin*, the order of the Appellate Division is reversed, with costs, and judgment of Supreme Court, New York County, reinstated.

JASEN, J. (concurring):

While I agree with the majority that the Twenty-First Amendment shields the challenged regulatory scheme from antitrust liability (*Battipaglia v New York State Liquor Authority*, 745 F2d 166, 168-170, affg 583 F Supp 8), I concur in reversing the order of the Appellate Division upon two additional grounds. I believe that the state activity in controlling the sale of alcoholic beverages does not contravene federal antitrust policy, and is, in any event, immunized from antitrust liability by the state action doctrine.

The threshold question is whether New York's liquor price maintenance program violates the Sherman Antitrust Act (15

U.S.C. § 1). (*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 US 97, 102.) The Sherman Act provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." (15 USC § 1.) Section 1 of the Sherman Act is directed only at joint action and does not proscribe independent business actions and decisions. (*Modern Home Inst. v. Hartford Accident & Indemnity Co.*, 513 F2d 102, 108-109.) The statute embraces a fundamental distinction between concerted and independent action. (*Copperweld Corp. v. Independence Tube Corp.*, ___ US ___, 104 S Ct 2731, 2740.) Unlike the California statute in *Midcal*, the New York regulatory scheme does not authorize or compel private parties to enter contracts or combinations in restraint of trade, nor does it condone agreements between independent businessmen. (*Morgan v Division of Liquor Control, Etc.*, 664 F2d 353, 355, affg sub nom. 512 F Supp 936; see *Fuchs Sugar & Syrups, Inc. v. Armstar Corp.*, 602 F2d 1025, 1029, cert den 444 US 917.) While a wholesaler may freely set prices under the New York regulatory system, his conduct is strictly unilateral.¹ The language of the Sherman Act should not be extended to preempt a system of state regulation where the challenged conduct involves a matter of special state interest (Twenty-First Amendment, US Const), and there is no agreement or joint action in restraint of trade at issue.

The Supreme Court has traditionally been hesitant to apply the Sherman Act in a manner which would defeat the policy of a state. (*United States v. Frankfort Distilleries*, 324 US 293, 299 [Black, J.]) This is especially true in the field of liquor control

¹ Other courts have recognized that antitrust liability for minimum mark-up statutes does not attach where the statutes do not immunize or implement agreements to restrain trade. (See, e.g., *Fisher Foods, Inc. v. Ohio Dept. of Liquor*, 555 F Supp 641; *Little Rock School District v. Borden Inc.*, 1980-2 Trade Cas. [CCH], ¶ 63,493 [E.D. Ark., August 5, 1980]; *George W. Cochran Co. v. Comproller*, 292 Md 3; *Walker v. Bruno's, Inc.*, 650 SW2d 357 [Tenn.].)

within state borders, where the Twenty-First Amendment, as a matter of constitutional law, accords state regulation of alcoholic beverages a preferred status. (*United States v. Frankfort Distilleries*, 324 US 293, 300-301, *supra* [Frankfurter, J., concurring].) Programs of state regulation, such as the challenged liquor pricing scheme, whose anticompetitive efforts are felt wholly within the enacting states, should be beyond the reach of the Sherman Act. (See Easterbrook, *The Court and the Economic System*, 98 Harv. L Rev 4, 51, n.120; Easterbrook, *Antitrust and Economics of Federalism*, 26 J. L. & Econ. 23.) The statute's wholly intrastate character virtually eliminates any conflict with the antitrust laws enacted on authority of the Commerce Clause (*Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F Supp 936, 943, affd sub nom. *Morgan v Division of Liquor Control, Etc.*, 664 F2d 353; cf. *Battipaglia v. New York State Liquor Auth.*, 745 F2d 166, 172, n.9, *supra*.)

Moreover, the aim of the antitrust laws, the maximization of consumer welfare², is not hindered by New York's liquor pricing scheme. As aptly demonstrated by the majority (slip op, at pp 6-9), the scheme protects consumer interests by avoiding an integrated system of liquor distribution. Economic liberty in New York's liquor industry is of paramount state concern, and New York's system of regulation is not to be preempted by the federal antitrust laws simply because it might hypothetically have an anticompetitive effect. (*Rice v. Norman*, 458 US 654, 659.) The state regulatory scheme may be easily reconciled with section 1 of the Sherman Act (15 USC § 1; cf. *Admiral Wine & Liquor Co. v. State Liquor Authority*, 61 NY2d 858, modg 89 AD 2d 522), by recognizing that: the regulatory scheme is of a clear intrastate character, no question of joint action in restraint of trade is involved, the distribution of alcoholic beverages has been constitutionally denominated a matter of proper concern for the states, and New York's liquor pricing scheme is congruous with the federal policy favoring

² See: R. Posner, *Antitrust Laws: An Economic Perspective* 8, 18-20; R. Bork, *The Antitrust Paradox: A Policy at War With Itself* 81; I. P. Areeda & D. Turner, *Antitrust Law*, at ¶¶ 103-105.)

competition. Thus, federal antitrust policy has not realistically been contravened by New York's regulation of liquor prices.

In the event that the operation of New York's liquor pricing system is thought to implicate federal antitrust interests, the "state action" doctrine immunizes the state scheme from antitrust liability. (*Parker v Brown*, 317 US 341; see also, *Olsen v Smith*, 195 US 332.) Application of the state action exemption is contingent upon satisfaction of the two-part standard set forth in *California Liquor Dealers v Midcal Aluminum*, (445 US 97, 105, *supra*):

"First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself. *City of Lafayette v Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.) (footnote omitted)."

Inasmuch as there is no question that the challenged liquor pricing scheme represents a clearly articulated and affirmatively expressed state policy, I turn to the question whether there has been active state supervision of the pricing scheme. Under *Midcal*, simply authorizing price setting and enforcing the prices established by private parties are insufficient state acts to confer *Parker* immunity. Rather, the Supreme Court establishes the following state actions which may be deemed indicia of active state supervision: price establishment, review of the reasonableness of the price schedules, regulation of the terms of fair trade contracts, the monitoring of market conditions, or any pointed reexamination of the program. (*Midcal, supra*, at pp 105-106.)

The Supreme Court's clear articulation and active supervision test is intended to prevent the "casting * * * [of] a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement". (*Midcal, supra*, at p 106; see also, *Serlin Wine & Spirit Merchants, Inc. v Healy*, 512 F Supp 936, 941-942, n.15, *affd sub nom. Morgan v Division of Liquor Control Etc.*, 664 F2d 353.) The test was borne of "the widespread perception that resourceful lawyers and ambitious

state officials had built on the precepts of *Parker* so creatively that large and important areas of each state's economy were alleged to be protected from antitrust scrutiny by what must have seemed in some cases to be a rather flimsy veil of state action". (Shenefield, *The Parker v Brown State Action Doctrine and The New Federalism of Antitrust*, 51 Antitrust L J 337, 340.) The posture of the instant appeals before this court is markedly different than the typical controversies in which private parties seek to invoke *Parker* immunity (e.g., *Midcal*). Here, in contrast, we are *not* presented with an attempt by a private party to seek safe harbor within the state action exemption. Rather, antitrust immunity is sought to be invoked by an instrumentality of the state, which has acted in a sovereign capacity, pursuant to clear legislative command. I submit that within the context of this action, the concerns sought to be remedied by the *Midcal* test are simply not present. The second test of *Midcal* has, in any event, been met by the State Liquor Authority's active supervision of the pricing scheme.

The case of *Morgan v Division of Liquor Control, Etc.* (*supra*) is instructive as to the resolution of the question whether there has been active state supervision of the challenged program. Of critical importance in the Second Circuit's determination that Connecticut's statutory regulation of the price of alcoholic beverages was actively supervised by that state was the fact that Connecticut established a minimum mark-up upon each type of alcoholic beverage offered for sale. (*Morgan v Division of Liquor Control, Etc.*, 664 F2d 353, 355-356.) In New York, a closely analagous statutory mark-up is directly imposed by the state. Off-premises retailers are generally not authorized to sell liquor at a price which is less than "cost" (Alcoholic Beverage Control Law § 101-bb[2].) "Cost" is defined as "the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor." (Alcoholic Beverage Control Law § 101-bb[2][b] [emphasis added].)

It has been said that a state sales-below-cost statute, which mandates minimum mark-ups, constitutes adequate supervision by the state, since the provision "not only reflects a legislative judgment that retailers should be required to charge certain minimum prices, but reflects a judgment as to what those prices should be." (Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 NYU L. Rev. 693, 722.) The 12% mark-up, as well as the requirement that manufacturers or distillers may only sell at prices which are no higher than the lowest prices charged wholesalers in any other state (Alcoholic Beverage Control Law § 101-b[3]), represent legislative policy determinations to displace unfettered competition at two critical stages of the distributive chain. Such restrictions constitute active state supervision.

The Supreme Court has held that active state supervision may be established if the state "monitor[s] market conditions" or engages in any "pointed reexamination" of the pricing program. (*California Liquor Dealers v. Midcal Aluminum*, 445 US 97, 106, *supra*.) In order to closely tailor the regulatory scheme to changing market conditions, the State Liquor Authority has conducted careful reexaminations of the price maintenance program. For example, Bulletin 471, which has been challenged and upheld on the instant appeal (slip op, at pp 20-22), advises wholesalers that "• • • there developed a situation during post-off period which resulted in what became known as a 'two bottle' price. The Authority has recognized this as undesirable, if not illegal • • •." This policy statement manifestly demonstrates that the Authority both "monitor[s] market conditions" and engages in "pointed reexamination", thus satisfying the *Midcal* requirement of active state supervision. Moreover, the Authority is authorized to respond to market forces in individual cases where wholesalers or retailers are aggrieved. Alcoholic Beverage Control Law section 101-b(3)(b) provides that a wholesaler may pass through increased costs of labor or other operating costs on the written permission of the Authority, for good cause shown and for reasons

not inconsistent with the Alcoholic Beverage Control Law. Also, wholesalers may be relieved of selling at the posted price if the prior written permission of the Authority, upon good cause shown, is secured. (Alcoholic Beverage Control Law § 101-b[3][b].) A retailer may offer to sell liquor at a price less than cost provided that prior written permission therefor is granted by the Authority for good cause shown and for reasons not inconsistent with the Alcoholic Beverage Control Law and under such terms and conditions as the Authority deems necessary. (Alcoholic Beverage Control Law § 101-bb[3].) The State Liquor Authority may determine the continued desirability of certain proscriptions as applied to the industry at large, or in individual cases involving hardships upon retailers and wholesalers. Such determinations, which respond to changing market conditions, are strong evidence of continuing regulatory supervision of the liquor pricing scheme. (See Morgan, *Antitrust and State Regulation: Standard of Immunity After Midcal*, 35 Ark. L. Rev. 453, 470.)

Another indicia of active state supervision is evidence that the Legislature has frequently debated the merits of the pricing system. (*Morgan v. Division of Liquor Control, Etc.*, 664 F.2d 353, 355, *supra*.) It cannot be seriously disputed that the legislative branch has periodically conducted a "pointed reexamination" of the challenged program. (*California Liquor Dealers v. Midcal Aluminum*, 445 US 97, 106, *supra*.) As well established by the majority (slip op, at pp 15-17), New York's pervasive regulation of the distribution of alcoholic beverages is the result of extensive legislative hearings during the last two decades. (See *House of Spirits v. Doyle*, 72 Misc.2d 1036, aff'd 43 AD2d 880, aff'd 36 NY2d 815.) Indeed, the liquor pricing program of this state remains a subject of substantial controversy in the New York State Legislature. (See, e.g., Vol 1, NYS Legis Digest, 1985, A. 5151; NYS Legis Rec. and Index, 1984, S. 6541; Page, *Antitrust, Federalism and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099, 1136, n.210.) There can be no question that the challenged

program has historically and periodically been subjected to pointed reexamination by means of official, legislative oversight.

Based upon the 12% minimum mark-up imposed upon the price of liquor to be sold by the retailer, the monitoring of market conditions affecting the liquor industry and individuals, the pointed reexamination of the pricing scheme by the executive and legislative branches, and the substantial legislative debate upon the pricing scheme, I would hold that there exists continuous and active state supervision of the regulatory scheme so as to confer antitrust immunity.

KAYE, J. (Dissenting)

I would affirm the Appellate Division orders for the reasons stated by Justice Lawrence J. Bracken (102 AD2d 240) and Justice E. Leo Milonas (102 AD2d 607).

The Twenty-first Amendment does not vest states with unlimited power to regulate alcoholic beverages in disregard of federal law. Rather, when such regulation is challenged we must make a "pragmatic effort to harmonize state and federal powers" (*California Retail Liq. Dealers Assn. v Midcal Aluminum*, 445 US 97, 109), and to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies" (*Capital Cities Cable v Crisp*, 104 S Ct 2694, 2708). The question, then, is whether New York can continue a system of resale price maintenance for alcoholic beverages, when price-fixing is condemned as a per se violation of the Sherman Act (see, e.g., *Monsanto Co. v Spray-Rite Serv. Corp.*, 104 S Ct 1464, 1469-1470).

Implicit in any analysis of state regulation under the Twenty-first Amendment is an assumption that the state policy supporting its regulation is not illusory. Neither of the two policies

declared to support the scheme of resale price maintenance—the promotion of temperance and the maintenance of an orderly market for alcoholic beverages—has substantial basis. The Moreland Commission concluded that "[n]either temperance nor respect for law is promoted by the artificially maintained high prices that sacrifice the interest of the consumer to the benefit of the liquor industry" (Moreland Commission Report and Recommendations No. 3, p 1). Even if the pricing scheme could be upheld as furthering a State policy to protect small retailers against *unfair* competition, it goes well beyond, and by fixing minimum resale prices effectively and unnecessarily forecloses *all* competition. Predatory pricing drives, followed by oligopolistic market conduct, are not an inevitable consequence of free competition in alcoholic beverages or any other industry, as evidenced by the many retail businesses in which large chains and small proprietorships exist side by side. With the full panoply of antitrust and other laws at their disposal, New Yorkers are hardly powerless to deal with unfair competition.

I note in addition that repeated dissatisfaction has been expressed with the compulsory resale price maintenance scheme today upheld by this Court. The Moreland Commission itself recommended in 1964 the repeal of provisions requiring minimum consumer resale prices (Moreland Commission Report and Recommendations No. 3, p 30). More recently, a Senate Committee recommended "the repeal of all controls on the price of alcoholic beverages (other than the requirement that manufacturers charge New Yorkers no more than their lowest price in all other states)" because such "controls unreasonably interfere with the proper and economic functioning of the alcoholic beverage industry." (Recommendation of the Senate Standing Committee on Investigations and Taxation for the Revisions of the Alcoholic Beverage Control Law, p 7 [June 25, 1981]).

No. 74—J.A.J. Liquor Store, Mtr. of, v. N.Y.S. Liquor Authority:

Judgment modified, with costs to appellant, and matter remitted to Supreme Court, Nassau County, with directions to remand to the State Liquor Authority for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer and Lynch concur. Judge Jasen concurs in a separate opinion. Judge Kaye dissents and votes to affirm in an opinion. Judge Alexander took no part.

No. 75—324 Liquor Corp., Mtr. of, v. McLaughlin:

Order reversed, with costs, and judgment of Supreme Court, New York County, reinstated. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer and Lynch concur. Judge Jasen concurs in a separate opinion. Judge Kaye dissents and votes to affirm in an opinion. Judge Alexander took no part.

Decided April 2, 1985

APPENDIX B

OPINION OF SUPREME COURT OF STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT (JULY 12, 1984) (102 APP. DIV. 2D 607, 478 N.Y.S.2d 615)

First Department, July 12, 1984

In the Matter of
324 LIQUOR CORP., Doing Business as
YORKSHIRE WINE & SPIRITS,
Appellant,
v
EDWARD J. McLAUGHLIN et al.,
Respondents.

APPEARANCES OF COUNSEL

Seymour Howard for appellant.

Robert S. Hammer of counsel (*Richard G. Liskov* with him on the brief; *Robert Abrams*, Attorney-General, attorney), for respondents.

OPINION OF THE COURT

MILONAS, J.

This CPLR article 78 proceeding was commenced by petitioner, a retail liquor and wine dealer, to review and annul a determination of the State Liquor Authority, dated November 12, 1982, which held it in violation of section 101-bb of the

Alcoholic Beverage Control Law and imposed a penalty of a 10-day suspension of its license plus a \$1,000 bond forfeiture. At the administrative hearing in connection with the instant matter, counsel for both parties stipulated that on June 24, 1981, a State Liquor Authority investigator purchased a 1.75 liter bottle of Chatham Gin, 92 proof, for \$9.45 plus sales tax and a 1.75 liter bottle of Smirnoff Vodka, 80 proof, for \$11.59 plus sales tax. Both of these brands were advertised by petitioner at the same prices. The Authority then produced as its only witness the principal clerk in charge of the price scheduling section, who testified as to the price schedules filed by petitioner's suppliers for the month of June, 1981. These schedules, which were introduced into evidence, indicated that the minimum consumer retail price for Chatham Gin was \$9.65 plus tax and \$11.89 plus tax for Smirnoff's Vodka.

While the foregoing facts are not in dispute, petitioner does challenge the validity of the statutory scheme and the regulations involved herein. In that regard, petitioner contends that the State's pricing machinery requires wholesalers to establish minimum retail prices for brands of liquors, eliminates price competition between retailers and is, therefore, invalid as a violation of the Federal Sherman Antitrust Act. Petitioner also asserts that by promulgating Rule 16, as set forth in Bulletin No. 471, the State Liquor Authority exceeded its lawful authority. Respondents, however, argue that the statutory provisions in question do not establish a mechanism for price maintenance but, rather, is merely a price-posting law of the sort found to be valid by the Court of Appeals in *Matter of Admiral Wine & Liq. Co. v State Liq. Auth.* (61 NY2d 858). In addition, respondents claim that Rule 16 constitutes a reasonable exercise by the State Liquor Authority of its authority under the Alcoholic Beverage Control Law. In dismissing the article 78 proceeding, Special Term considered respondents' position to be persuasive (119 Misc 2d 746).

Section 101-b (subd 3, pars [a], [d]) of the Alcoholic Beverage Control Law mandate manufacturers and distillers to file monthly schedules with the State Liquor Authority, listing their prices to wholesalers, along with an affirmation that the prices

are no higher than the lowest prices charged to wholesalers in any other State. This requirement does not affect the minimum retail price which the retailer may charge the consumer. Section 101-b (subd 3, par [b]) requires wholesalers to file schedules of their prices to retailers which shall state "the number of bottles contained in each case, the bottle and case price to retailers * * * the discounts for quantity, if any". Consequently, when a wholesaler first obtains a brand of liquor for resale to retailers, it alone fixes its "legal price" for that brand. No statute or rule dictates the initial price which a wholesaler may set; there is no review procedure in existence, nor does the agency maintain any standards or prohibitions. The only restriction on pricing is that a wholesaler may not thereafter increase its price without the agency's approval.

When a wholesaler has fixed the "legal case price" on a brand of liquor, Rule 16 then comes into operation. According to Rule 16.4 (e): "For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent." (9 NYCRR 65.4 [e].)

Thus, if the "legal case price" of a brand of liquor is determined by the wholesaler to be \$60 per case, and the case contains six bottles, the legal price becomes \$60 plus \$1.92 divided by 6, or \$10.32 per bottle. After having filed the first schedule, the wholesaler may at its own discretion reduce or "post-off" the "legal case price" of any brand of liquor without restriction. The wholesaler is free even to sell a brand below cost. Pursuant to Bulletin No. 471, which was issued in June of 1973, the wholesaler was given even greater latitude in setting the minimum retail price of a brand of liquor. The

Authority now notified wholesalers they would be allowed to decide unilaterally whether a "post-off" on the case price of a brand should be accompanied by a similar reduction in the bottle price. In that regard, the wholesaler could follow one of three alternatives: (1) elect not to reduce the bottle price, (2) reduce the bottle price to conform with the "post-off" case price, or (3) adopt a bottle price anywhere between the extremes permitted under options "1" and "2".

Subdivision 2 of section 101-bb of the Alcoholic Beverage Control Law provides that the bottle price fixed by a wholesaler in its monthly schedule plus 12% of that price totals the minimum authorized retail price for that brand. Except for this statutorily mandated 12% markup on the wholesaler's bottle price, the State does not review, supervise, control or participate in the wholesaler's largely unlimited price-fixing role. For instance, if the wholesaler, in accordance with Bulletin No. 471, reduces or "posts-off" the case price of a brand of liquor from \$60 to \$55 a case but retains the legal bottle price of \$10.32, any retailer purchasing a case of that brand is then prohibited from selling below the \$10.32 legal bottle price plus 12% of that price, or \$11.56 per bottle. Based on the \$55 cost, the return to the retailer is not a markup of 12% but of 26%. Indeed, wholesalers are permitted to set the bottle and case prices in such a manner as to afford the retailers huge markups, while ensuring that there is no competition at the retail level and that, consequently, the profits available to the wholesalers and the retailers are not passed along to the consumers.

It is a principle of law that the construction generally given to statutes and regulations by the agency responsible for their administration will, if not irrational or unreasonable, be upheld. (*Matter of Johnson v Joy*, 48 NY2d 689; *Matter of Howard v Wyman*, 28 NY2d 434.) However, in *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451, 459), the Court of Appeals declared that where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on

any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."

The leading case in the subject matter before us is *California Liq. Dealers v Midcal Aluminum* (445 US 97). After examining California's plan for wine pricing, the United States Supreme Court found that that State's system, by illegally restraining trade, constituted price maintenance in violation of the Sherman Act. The court, after referring to the power of the wine producer to prevent price competition by dictating the prices charged by wholesalers, stated that "such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other' " (at p 103). The Court then proceeded to consider whether the State's involvement in the price-setting program was sufficient to establish antitrust immunity under *Parker v Brown* (317 US 341). Based upon its interpretation of a series of its own prior rulings, the court concluded (at pp 105-106) that: "These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself * * * The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."

The Supreme Court went on to agree with the view expressed by the California Supreme Court in *Rice v Alcoholic Beverage Control Appeals Bd.* (21 Cal 3d 431) that the State interests asserted by California were "less substantial than the national policy in favor of competition." (*California Liq. Dealers v Midcal Aluminum, supra*, at p 113.) In *Rice*, the court therein had described the California scheme as one in which "the prices imposed upon the retailers are those determined in the sole discretion of the producers, and * * * the department does not participate in determining the minimum price, but only enforces the price set by the producers." (21 Cal 3d, at p 440.)

Following the decision by the United States Supreme Court in *California Liq. Dealers v Midcal Aluminum (supra)* the New York Court of Appeals in *Matter of Mezzetti Assoc. v State Liq. Auth.* (51 NY2d 761) declared invalid the minimum pricing scheme for wine. Although the Court of Appeals has not yet reviewed the validity of the price maintenance program at issue here, it did hold that the State Liquor Authority exceeded its authority under the Alcoholic Beverage Control Law in requiring that the New York City excise tax, or a 20% markup, be included in the cost to consumers (*Mancini v McLaughlin*, 54 NY2d 860.)

Respondents, in urging that the New York State Legislature has enacted a price-posting rather than a price-maintenance system, point to *Matter of Admiral Wine & Liq. Co. v State Liq. Auth. (supra)* and *Battipaglia v New York State Liq. Auth.* (583 F Supp 8 [SDNY, 1982]) in support of their position. However, in neither of those cases was a minimum resale pricing scheme involved. Indeed, both courts specifically asserted that the requirement to post wine prices is not a resale price maintenance law. According to the court in *Admiral*, "Subdivision 3 of section 101-b does not authorize anyone to determine retail prices for wine, nor does it bind other wholesalers as to the prices which they may charge their dealers" (61 NY2d, at p 861). Significantly, there is no resale price maintenance statute in New York which relates to the retail sale of

wine, and section 101-b of the Alcoholic Beverage Control Law, insofar as it pertains to wine, has no relevance to any statutory minimum retail price.

Respondents' reliance upon *Serlin Wine & Spirit Merchants v Healy* (512 F Supp 936, *affd sub nom. Morgan v Division of Liq. Control*, 664 F2d 353) is similarly misplaced. The court in that situation distinguished *California Liq. Dealers v Midcal Aluminum (supra)* not on the ground that the disputed statute was simply a price-posting law but because the State of Connecticut actually set the price, establishing the markup of both the wholesalers and the retailers and thereby supervising and restricting the wholesalers in fixing their price to retailers. Unlike the New York pricing system, every segment of the liquor industry was controlled by specific markups directed by Connecticut. Consequently, the Connecticut statutory plan complied with the second standard enunciated by the United States Supreme Court—that is, the State policy must be "actively supervised" by the State itself. In New York, on the other hand, except for the 12% markup mandated by subdivision 2 of section 101-bb, the State has no review, supervision or control over the wholesaler in setting the case or the bottle price of a brand of liquor. The wholesaler is at liberty to charge any bottle price that it deems fit in any month subject only to a ceiling it itself established, the "legal price". Other than the fact that the wholesaler needs the Authority's approval to raise the "legal price", the agency has no power to review or limit in any way the prices fixed by the wholesalers. In fact, by virtue of Bulletin No. 471, the Authority directly encourages the wholesaler to use its unfettered discretion in establishing prices, and then the agency simply enforces the minimum retail resale prices.

Subdivision 1 of section 101-b of the Alcoholic Beverage Control Law provides that: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In

order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations."

There is no doubt that this statement of policy is sufficient to meet the first standard necessary to establish antitrust immunity under *Parker v Brown* (*supra*). However, it is the second requirement, that the State must actively supervise or review the fixing of prices, which the New York price maintenance scheme clearly fails to satisfy. The prices are set by the wholesalers, and the Authority enforces them. Moreover, all retailers are bound by these prices. Since the wholesaler may amend its schedule downward to meet competition, the pricing mechanism in New York not only enables the wholesaler to destroy price competition by dictating the minimum prices to retailers but also prevents horizontal competition. In addition, notwithstanding section 101-b of the Alcoholic Beverage Control Law, which expressly forbids any discount in excess of 2% for quantity purchases of liquor by a retailer, the Authority, by issuing Bulletin No. 471, permits the wholesaler to give a discount over 2% to those retailers who purchase a case or more of a brand of liquor and also allows the wholesaler to fix a minimum retail resale price which affords case purchasers a markup far above the 12% authorized by statute. Yet, nowhere does the Alcoholic Beverage Control Law delegate any power to the agency to fix prices or permit wholesalers to grant discounts in excess of those dictated by section 101-b. It is evident that the New York State pricing maintenance scheme for liquors not only violates the Sherman Antitrust Act but that, even within the system enacted by the Legislature, the State Liquor Authority exceeded its authority. (See *Matter of J.A.J. Liq. Store v New York State Liq. Auth.*, 102 AD2d 240,

in which the Second Department reached the same conclusion as this court regarding the validity of the New York State statutory resale retail price maintenance system for alcoholic beverages.)

Consequently, the judgment of the Supreme Court, New York County (Arthur Blyn, J.), entered on July 1, 1983, which dismissed petitioner's application pursuant to CPLR article 78 should be reversed, on the law, the petition granted, and the determination of the State Liquor Authority, dated November 12, 1982, annulled, without costs or disbursements.

SULLIVAN, J.P., CARRO and ALEXANDER, JJ., concur.

Judgment, Supreme Court, New York County, entered on July 1, 1983, unanimously reversed, on the law, the judgment vacated, the petition granted, and the determination of the State Liquor Authority dated November 12, 1982 annulled, without costs and without disbursements.

APPENDIX C

**OPINION OF SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK, SPECIAL TERM I (JUNE 23, 1983)
(119 MISC. 2D 746, 464 N.Y.S.2d 355)**

SUPREME COURT
Special Term, New York County
June 23, 1983

In the Matter of
324 LIQUOR CORP., Doing Business as
YORKSHIRE WINE & SPIRITS,
Petitioner,
—v.—
EDWARD J. McLAUGHLIN et al.,
Respondents.

APPEARANCES OF COUNSEL

Seymour Howard for petitioner. *Robert Abrams*, Attorney-General (*Robert S. Hammer* of counsel), for respondents.

OPINION OF THE COURT

ARTHUR E. BLYN, J.

In this article 78 proceeding, petitioner seeks to review and annul respondents' determination which after a hearing found

it guilty of advertising and selling liquor at a price below the minimum retail price allowed by law and suspended its license for 10 days and ordered its compliance bond forfeited.

At the hearing petitioner stipulated that it had advertised and sold the liquor as charged in respondents' specifications, but contended that the minimum resale prices relied upon by the State Liquor Authority were illegal. The trier of fact sustained the charges and the findings were confirmed by the commissioner and the penalty imposed.

In this proceeding, petitioner, while admitting the facts of the sale, renews its challenge to the legality of the statute and regulations under which it was charged. Specifically, petitioner contends that (1) the statutory scheme contained in sections 101-b and 101-bb of the Alcoholic Beverage Control Law, which in effect requires wholesalers to establish minimum retail prices for brands of liquor and eliminates price competition among retailers, is invalid as a violation of the Sherman Antitrust Act; (2) in promulgating its rule 16 which requires that the price per bottle must exceed the price per the case in which it is contained by \$1.92 divided by the number of bottles in the case, the authority exceeded its powers since it does not have the statutory power to compel wholesalers to add any amount to their prices; and (3) by issuing its bulletin 471 which permitted wholesalers to "post-off" (i.e., reduce) the legal case price in any month without fully passing through the full "post-off" to the bottle price, the authority exceeded its statutory powers by allowing wholesalers to offer quantity discounts in excess of those permitted by section 101-b of the Alcoholic Beverage Control Law and to fix the legal minimum of that intended by statute.

Petitioner's challenge to the State's pricing regulatory mechanism is, however, without merit, and its reliance on *California Liq. Dealers v Midcal Aluminum* (445 US 97) misplaced. Section 101-b is a price-posting rather than a resale price maintenance statute such as was at issue in *California Liq. Dealers v Midcal Aluminum* (*supra*). (*Battipaglia v New York State Liq. Auth.*, 80 Civ 5701 [US Dist Ct, SDNY, 1982].)

Thus, there is no conflict between that section and the Sherman Act: "[The section] requires that each wholesaler publish the prices at which it will sell its products to retailers, permits adjustments *downward* to meet competition, and mandates that it will maintain any prices for a 30-day period. The statute also requires that retailers purchase only liquor and wine sold in compliance with this system. In all other material respects, section 101-b is silent about retail sales". (*Battipaglia v New York State Liq. Auth.*, *supra*.)

It is the State, *not* the wholesalers which sets the price range at the lower levels of distribution (*Battipaglia v New York State Liq. Auth.*, *supra*; *Serlin Wine & Spirit Merchants v Healy*, 512 F Supp 936). Similarly, that retailers may not sell their products at a price below their "cost" (defined as the price to the retailer plus 12% of such price), as required by section 101-bb of the Alcoholic Beverage Control Law, does not on its face constitute price fixing by a private party, i.e., the wholesaler, since it merely sets the floor below which the retail price may not be set. State regulation such as that involved here is, of course, immune from antitrust regulation since its restraints are clearly articulated and affirmatively expressed as State policy and the policy itself is actively supervised by the State (*California Liq. Dealers v Midcal Aluminum*, *supra*, at p 105).

Nor does the Authority's promulgation of rule 16 or of bulletin 471 exceed its authority under the Alcoholic Beverage Control Law. While it is axiomatic that the State Liquor Authority is promulgating regulations may not exceed the authority conferred upon it by statute (*Mancini v McLaughlin*, 54 NY2d 860), a comparison of rule 16 and bulletin 471 with sections 101-b and 101-bb make it clear that no such violation has occurred here. Section 101-b (subd 3, par [b]) provides in pertinent part: "No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect * * * Such brand of liquor * * * shall not be sold to retailers except at the price * * * then in effect unless prior written permission of the authority is granted for good cause shown

and for reasons not inconsistent with the purpose of this chapter".

Thus, it is within the statutory authority of the State Liquor Authority to promulgate reasonable rules and regulations not inconsistent with the purposes of the Alcoholic Beverage Control Law. It is well settled that an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight (*Matter of Herzog v Joy*, 74 AD2d 372). Petitioner fails to demonstrate how, if at all, promulgation of rule 16, which provides the method for determining the per bottle price of each liquor item based on the case price, or bulletin 471, which permits a variation on the computed bottle price within a limited price range, exceeds the State Liquor Authority's statutory mandate under subdivisions 3 and 6 of section 101-b of the Alcoholic Beverage Control Law.

Accordingly, none of the grounds raised by petitioner concerning the validity of the statutes, rules or regulations upon which respondents' determination was based are sufficient to warrant this court's annulling that determination. Given that finding, and the undisputed factual basis upon which the determination was made, the court finds that there was a rational basis for that determination and petitioner's application therefore is denied and its petition dismissed.

APPENDIX D**ORDER OF SUSPENSION OF NEW YORK STATE
LIQUOR AUTHORITY (NOVEMBER 12, 1982)**

NOTICE TO LICENSEE: The original of this order which must be posted on premises, will be personally served upon you prior to or on the first day of the suspension period. Keep the license certificate on the premises until called for by an authorized representative of the Liquor Authority.

NEW YORK STATE LIQUOR AUTHORITY

**IN THE MATTER OF PROCEEDINGS
TO SUSPEND, CANCEL OR REVOKE**

License Number: 1 L 8221
 Issued to: 324 Liquors Corp.
 Yorkshire Wine & Spirits
 Licensed Premises: 324 East 86th Street
 New York, New York

ORDER OF SUSPENSION
BOND \$1,000
 Serial No.
 New York L 4967

Proceedings have been duly instituted pursuant to the provisions of the Alcoholic Beverage Control Law, (Chapter 478 of the Laws of 1934, as amended) to suspend, cancel or revoke the above license issued to the licensee for premises located at the address stated above and the licensee having duly pleaded "no contest" to the charges contained in the notice of hearing

or a hearing having been duly held by the State Liquor Authority in connection with said proceedings, and

Said proceedings having been duly considered by the State Liquor Authority at a meeting duly held on October 27, 1982, and due deliberation having been had thereon, and the Authority having duly adopted the findings of the hearing officer and duly found that

That the licensee violated Section 101-bb of the Alcoholic Beverage Control Law in that it advertised and/or sold liquor at a price less than cost on June 24, 1981.

NOTICE

IN CALCULATING THE NUMBER OF DAYS OF SUSPENSION SUNDAYS & CHRISTMAS ARE NOT INCLUDED

WARNING!

You are required to be present on the licensed premise on date suspension begins in order to surrender your license to a representative of this office. Your failure will be cause for revocation of your license.

IT IS HEREBY ORDERED that the license aforesaid issued to said licensee for the above described premises be, and the same hereby is **SUSPENDED***, for the period hereinafter specified and demand is hereby made upon said licensee and the surety company executing the bond filed by said licensee in connection with the issuance of said license, for the penal sum specified; and the said licensee file an appropriate bond with the State Liquor Authority prior to the expiration of the period of suspension provided for herein, and

* 10 days suspension (XX days remitted on "No Contest" plea). 10 days to be served forthwith—Execution of balance of penalty, to wit XX days will be temporarily deferred, subject to being put into effect in the event the Authority, within its sole discretion, is satisfied from information it receives or obtains that the licensee has not taken practical precautions to assure the proper conduct of the licensed premises since the date of any violation set forth above or within twelve months from the date hereof.

IT IS FURTHER ORDERED that said licensee be, and hereby is, prohibited from trafficking in alcoholic beverages for the period beginning on January 3, 1983, at 10 A.M.; and ending on January 14, 1983, at 10 A.M.; and

IT IS FURTHER ORDERED that said licensee surrender said license forthwith to the State Liquor Authority or its duly authorized representative, upon commencement of this said period of suspension, and

IT IS FURTHER ORDERED that failure by the licensee to comply with the terms of this order shall result in the cancellation or revocation of the said license in accordance with the provisions of the Alcoholic Beverage Control Law.

Dated November 12, 1982

STATE LIQUOR AUTHORITY
/s/ EDWARD J. McLAUGHLIN
Chairman

Certified by

BARBARA JOANNI LORD
Secretary to the Authority

To: 324 East 86th St., N.Y., N.Y. New York City ABC Board
(CERTIFIED MAIL) #106466 (Local Board)

THIS ORDER OF SUSPENSION MUST BE PUBLICLY DISPLAYED
IN THE FOLLOWING MANNER:

If there be a door opening from the street into the licensed premises and a window facing the street upon which such door opens, such order shall be displayed in such window so that it may be readily seen from the street. If the licensed premises are otherwise located, such order shall be affixed to the door of the entrance to the premises.

THIS SUSPENSION ORDER MUST NOT BE REMOVED FROM THE WINDOW DURING THE ABOVE PERIOD OF THIS SUSPENSION.

Please take notice that any person who shall sell any alcoholic beverage during the suspension period shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$200 or by imprisonment in a county jail or penitentiary for a term of not more than six months or both. (Section 130 of the Alcoholic Beverage Control Law.)

RDP

CC: Seymour Howard, Esq.,
580 North Broadway
Jericho, N.Y. 11753

APPENDIX E

**HEARING OFFICER'S REPORT,
NEW YORK STATE LIQUOR AUTHORITY,
HEARING BUREAU (JULY 17, 1982)**

EXHIBIT "I"—HEARING OFFICER'S REPORT

NEW YORK STATE LIQUOR AUTHORITY
Hearing Bureau
250 Broadway
New York, N. Y. 10007

In the Matter of the Proceedings to Suspend
Serial No.: New York L 4967
Issued to: 324 Liquor Corp.
d/b/a Yorkshire Wine & Spirits
Licensed Premises: 324 East 86th Street
New York, New York 10028

Before ANDREW LEE AUBRY—*Hearing Officer.*

Hearing was held on January 20, 1982 on the following charge:

"That the licensee violated Section 101-bb of the Alcoholic Beverage Control Law in that it advertised and/or sold liquor at a price less than cost on June 24, 1981."

The Authority was represented by Harold S. Goldman, Esq.
The licensee was represented by Seymour Howard, Esq., 580 North Broadway, Jericho, New York 11753.

Authority's Exhibits 1 through 3 and Licensee's Exhibit "A" in evidence.

Mark Klinkowitz testified as a witness for the Authority.

Based on the testimony and record in this case, the Hearing Officer makes the following.

FINDINGS OF FACT: The following stipulations were entered into by counsel for the Authority and counsel for the licensee:

1. On June 24, 1981, a Liquor Authority Investigator purchased a 1.75 liter bottle of Chatham Gin, 92 proof, for \$9.45 plus eight per cent sales tax, which was \$.76, the total purchase price was \$10.30.
2. That the manager of the licensed premises stated that the supplier of Chatham Gin was Sterling.
3. That on June 24, 1981, another Liquor Authority Investigator purchased a 1.75 litre bottle of Smirnoff Vodka, 80 proof, for \$11.59, plus eight per cent sales tax of \$.93, total purchase price was \$12.52.
4. That this item of Smirnoff Vodka was advertised at \$11.59, plus tax.
5. That the manager of the premises told the investigator that the supplier of Smirnoff Vodka was Major.

Sterling is a division of Peerless Importers, Inc.

In accordance with the Alcoholic Beverage Control Law, Peerless Importers, Inc. filed a schedule of liquor prices to retailers for the effective month of June, 1981 listing the minimum bottle resale price of a 1.75 litre of Chatham Distilled London Dry Gin listing the minimum bottle resale price as \$9.65 before sales tax.

Major is a division of Star Industries, Inc.

In accordance with the Alcoholic Beverage Control Law, Star Industries, Inc. filed a schedule of liquor prices to retailers for the effective month of June, 1981 for a 1.75 litre bottle of

Smirnoff Vodka listing a minimum bottle resale price of \$11.89 plus sales tax.

OPINION: The licensee violated Section 101-bb of the Alcoholic Beverage Control Law on June 21, 1981 in that it sold a 1.75 litre bottle of Chatham Gin, 92 proof, for \$9.45 plus eight per cent sales tax which was \$.20 below the schedule of liquor prices to retailers filed by Peerless Importers, Inc., the parent company of Sterling, which was the supplier of Chatham Distilled London Dry Gin to the licensee which listed the minimum bottle resale on its schedule as \$9.65.

The licensee violated Section 101-bb of the Alcoholic Beverage Control Law on June 24, 1981, in that it sold a 1.75 litre bottle of Smirnoff Vodka for \$11.59 plus eight per cent sales tax which was \$.30 below the schedule of liquor prices to retailers filed by Star Industries, Inc., the parent company of Major, which was the supplier of Smirnoff to the licensee, which listed the minimum bottle resale at \$11.89.

CONCLUSION: The licensee violated Section 101-bb of the Alcoholic Beverage Control Law in that it advertised and/or sold liquor at a price less than cost on June 24, 1981.

Counsel for the licensee contended at the Hearing and contends in his memorandum (attached) that the minimum resale prices relied upon by the Authority are illegal. It is not within the scope of the authority of the Hearing Officer to determine the legality of the Rules of the State Liquor Authority and the Alcoholic Beverage Control Law. That question must be left for another forum. The charge is sustained.

/s/ ANDREW LEE AUBRY 7/16/82

Andrew Lee Aubry
Hearing Officer

ALA:djh
attch.

APPENDIX F

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT, IN J.A.J. LI-
QUOR STORE, INC. v. NEW YORK STATE LIQUOR AUTHORITY
(JUNE 11, 1984) (102 APP. DIV. 2D 240, 478 N.Y.S 2d 318)

Second Department, June 11, 1984

In the Matter of

J.A.J. LIQUOR STORE, INC.,

Petitioner,

v

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

APPEARANCES OF COUNSEL

Seymour Howard for petitioner.

Gloria M. Dabiri (*Stephen D. Kalinsky* of counsel), for respondent.

OPINION OF THE COURT

BRACKEN, J.

This is a proceeding pursuant to CPLR article 78 to review a determination of respondent State Liquor Authority which, after a hearing, found that petitioner, a retail liquor store licensee, had violated subdivision 4 of section 63 and subdivi-

sion 2 of section 101-bb of the Alcoholic Beverage Control Law. By order of the Supreme Court, Nassau County (McGinity, J.), entered July 27, 1981, the proceeding was transferred to this court (CPLR 7804, subd [g]). We must decide whether respondent's determination is supported by substantial evidence (CPLR 7803, subd 4). However, the initial issue for resolution is whether this State's statute prohibiting the retail sale of liquor for off-premises consumption at less than cost (Alcoholic Beverage Control Law, § 101-bb) violates the Sherman Antitrust Act (US Code, tit 15, § 1 *et seq.*), which declares combinations in restraint of trade to be illegal.

The evidence adduced at the hearing established that on January 25, 1980, respondent's investigators purchased a bottle of Johnny Walker Red Label Scotch Whiskey at petitioner's premises for \$9.50, together with a bottle of Bacardi Rum for \$6.09. At the time of the sale, the minimum resale price for those products was \$9.99 and \$6.36, respectively. On the basis of this evidence, respondent determined that petitioner had sold liquor at less than the minimum resale price in violation of subdivision 2 of section 101-bb of the Alcoholic Beverage Control Law. Although the factual evidence substantially supports this portion of respondent's determination, we are nevertheless constrained to annul the determination upon the ground that the statute alleged to have been violated is invalid.

Subdivision 2 of section 101-bb of the Alcoholic Beverage Control Law prohibits the retail sale of liquor for off-premises consumption at a price which is less than cost. The statute defines "cost" as the "price" of an item of liquor to the retailer plus 12%, which is declared to be the legislatively determined average minimum overhead necessarily incurred by the retailer in the sale of such an item (Alcoholic Beverage Control Law, § 101-bb, subd 2, par[b]). The term "price" is defined as the bottle price to the retailer contained in a monthly schedule filed with the State Liquor Authority by the manufacturer or wholesaler from whom the retailer purchases liquor and which schedule is in effect at the time the retailer sells such item (Alcoholic Beverage Control Law, § 101-bb, subd 2, par [b]).

The "price" is established by the manufacturer or wholesaler in its monthly schedule, without any review as to its reasonableness or other control by the State (Alcoholic Beverage Control Law, § 101-bb, subd 2, par [b]; § 101-b). Thus, although the State requires the retailer to sell liquor at not less than 12% above the wholesale price (Alcoholic Beverage Control Law, § 101-bb, subd 2, par [b]), the price is fixed in the first instance by the manufacturer or wholesaler, who thereby effectively controls the price charged by all retailers purchasing from such manufacturer or wholesaler. As such, the State's statutory scheme merely authorizes price setting by private parties and, in essence, enforces the prices so set.

We previously have held that subdivision 2 of section 101-bb fell within the intended scope of the Twenty-First Amendment to the United States Constitution and constituted State action which did not conflict with the Sherman Antitrust Act (*Matter of Theodore Polon, Inc. v State Liq. Auth.*, 59 AD2d 946; see, also, *Matter of Ritter Wines & Ligs. v State Liq. Auth.*, 70 AD2d 643). Moreover, we reached the same conclusion with respect to the parallel provision of the statute governing minimum consumer resale prices of wine, and our determination was affirmed by the Court of Appeals (Alcoholic Beverage Control Law, § 101-bbb; see *Matter of Mezzetti Assoc. v State Liq. Auth.*, 66 AD2d 800, affd 49 NY2d 753). However, the Court of Appeals subsequently granted reargument in *Matter of Mezzetti Assoc. v State Liq. Auth.* (49 NY2d 981) and thereafter reversed this determination of statutory validity (51 NY2d 761) on the basis of *California Liq. Dealers v. Midcal Aluminum* (445 US 97).

In *Midcal* (*supra*), the Supreme Court of the United States considered a challenge to California's system of resale price maintenance for wine. Under the California statutes, wine producers, wholesalers and rectifiers were required to file fair trade contracts or price schedules with the State, and no State-licensed wine merchant was permitted to sell wine to a retailer at a price other than the price stated in the contract or schedule (Cal Bus & Prof Code, §§ 24862, 24866). As is the case in New York, the State of California exercised no control

over the wine prices set by the producers, wholesalers or rectifiers (*California Liq. Dealers v Midcal Aluminum, supra*, pp 99-100).

California's wine pricing system was held to constitute resale price maintenance in violation of the Sherman Antitrust Act, in that the producer was given the power to prevent price competition by "dictating" the prices charged by wholesalers (*California Liq. Dealers v Midcal Aluminum, supra*, p 103).

Having determined that the Sherman Antitrust Act was implicated, the court then considered whether California's involvement in the price-setting program was sufficient to establish antitrust immunity under *Parker v Brown* (317 US 341), i.e., whether the challenged restraint was clearly articulated and affirmatively expressed as State policy, and whether that policy was actively supervised by the State itself (*California Liq. Dealers v Midcal Aluminum, supra*, pp 103, 105). The court found that the California resale price maintenance scheme satisfied the first prong of the test for antitrust immunity, in that the legislative policy of permitting resale price maintenance was clearly reflected in the statutes. However, California's program did not satisfy the second prong of the *Parker* test, since the State merely authorized price setting and enforced prices set by private parties, without exercising any control, monitoring or review over the prices set (*California Liq. Dealers v Midcal Aluminum, supra*, pp 105-106). Thus, the court concluded that the State of California was not cloaked with antitrust immunity in this instance.

Finally, the court rejected the argument that application of the Sherman Antitrust Act against the State was barred by section 2 of the Twenty-First Amendment to the United States Constitution, which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited".

The court noted that the California courts had identified that State's interests protected by the resale price maintenance system as: (1) promoting temperance; and (2) promoting order-

ly market conditions by protecting small licensees from bargain sales and price-cutting policies of the larger retailers (*California Liq. Dealers v Midcal Aluminum, supra*, pp 111-112, citing *Midcal Aluminum v Rice*, 90 Cal App 3d 979, 983, and *Rice v Alcoholic Beverage Control Appeals Bd.*, 21 Cal 2d 431, 451, 456). The court accepted the determination of the California courts that there was little correlation between price maintenance and temperance, or between price maintenance and the survival of small retailers, and concluded that the asserted State interests were outweighed by the national policy favoring competition, as reflected in the Sherman Antitrust Act. Accordingly, the Twenty-First Amendment did not permit the State to regulate wine prices in a manner violative of the Sherman Antitrust Act (*California Liq. Dealers v Midcal Aluminum, supra*, pp 113-114).

A comparison of this State's retail price maintenance system for liquor (Alcoholic Beverage Control Law, § 101-bb) and those resale price maintenance systems for wine which have been declared to have impermissibly restrained trade (*California Liq. Dealers v Midcal Aluminum*, 445 US 97, *supra*; *Matter of Mezzetti Assoc. v State Liq. Auth.*, 51 NY2d 761, *supra*), reveals no substantive differences. Under the California statutes invalidated in *Midcal (supra)*, no State-licensed wine merchant was permitted to sell wine to a retailer at a price other than that established by the producer, wholesaler or rectifier in a fair trade contract or price schedule filed with the State (*California Liq. Dealers v Midcal Aluminum, supra*, pp 99-100). Under the New York statute invalidated in *Mezzetti (supra)* on the authority of *Midcal (supra)* (see *Matter of Mezzetti Assoc. v State Liq. Auth.*, 51 NY2d 761, 762, *supra*), licensees authorized to sell wine at retail for off-premises consumption were prohibited from selling at less than the minimum consumer retail price established by the manufacturer or wholesaler in price schedules filed annually with the State Liquor Authority (Alcoholic Beverage Control Law, § 101-bbb). Under the statute applicable to the present case (Alcoholic Beverage Control Law, § 101-bb, subd 2), licensees

authorized to sell liquor at retail for off-premises consumption are prohibited from selling at less than 12% above the price to the retailer as established by the manufacturer or wholesaler in monthly price schedules filed with the State Liquor Authority.

The New York statutes differ somewhat from their California counterparts in that New York proscribes resale at *less than* a certain price, while California prohibited resale at *other than* a certain price. In addition, both sections 101-bb and 101-bbb permit licensed retailers to sell at less than the minimum retail price upon written permission of the State Liquor Authority, which may be granted for good cause shown and for reasons consistent with the purpose of the statutes (Alcoholic Beverage Control Law, § 101-bb, subd 3; § 101-bbb, subd 5). However, these distinctions do not alter the essential character of New York's statutory scheme, under which manufacturers and wholesalers are empowered to dictate the minimum prices to be charged by retailers, thereby placing a severe restraint upon competition. Moreover, the Court of Appeals apparently concluded that New York's statute governing consumer resale price of wine (Alcoholic Beverage Control Law, § 101-bbb) was indistinguishable from the California statute found in *Midcal* (*supra*) to have violated the Sherman Antitrust Act (see *Matter of Mezzetti Assoc. v State Liq. Auth.*, 51 NY2d 761, 762, *supra*). Thus, we conclude that this State's parallel provision which prohibits retail sales of liquor at less than cost (Alcoholic Beverage Control Law, § 101-bb) constitutes retail price maintenance which restrains trade in violation of the Sherman Antitrust Act (see *California Liq. Dealers v Midcal Aluminum*, *supra*, p 102).

Having determined that the resale price maintenance system created by section 101-bb is an unlawful restraint on trade, the next question is whether New York's regulation of retail liquor sales under that section is immune from Federal antitrust legislation (see *Parker v Brown*, 317 US 341, *supra*). A two-pronged test for determining the applicability of antitrust immunity has been established: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as

state policy'; second, the policy must be 'actively supervised' by the State itself" (*California Liq. Dealers v Midcal Aluminum*, 445 US 97, 105, *supra*, citing *Lafayette v Louisiana Power & Light Co.*, 435 US 389, 410).

The New York resale price maintenance system for liquor clearly satisfies the first prong of this test, since the State's policy of fostering and promoting temperance in the consumption of alcoholic beverages and in promoting the orderly sale and distribution of liquor is both clearly articulated and affirmatively expressed in the statute itself (Alcoholic Beverage Control Law, § 101-bb, subd 1; see, also, *House of Spirits v Doyle*, 72 Misc 2d 1036, affd 43 AD2d 880). However, it is equally clear that the State has failed to satisfy the second prong of the test, because it does not actively supervise its resale price maintenance system. As we have already noted, the statute permits liquor prices to be set by manufacturers and wholesalers, who thereby effectively control the prices charged by retailers (Alcoholic Beverage Control Law, § 101-bb, subd 2). The State is given no authority to either establish liquor prices or to review the reasonableness of the prices set by the manufacturers or wholesalers. Thus, like the California resale price maintenance system which was found in *Midcal* (*supra*, pp 105-106) not to be immune from the Sherman Antitrust Act, New York merely authorizes private parties to set prices and then enforces those prices. A State cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (*Parker v Brown*, *supra*, p 351). Therefore, it is our conclusion that the resale price maintenance system created by section 101-bb is not immune from the provisions of the Sherman Antitrust Act.

Finally, we reject any claim that application of the Sherman Antitrust Act against the State is barred by the Twenty-First Amendment. The interests of New York which are protected by its resale price maintenance system, i.e., promotion of temperance and orderly market conditions (Alcoholic Beverage Control Law, § 101-bb, subd 1; see, also, *House of Spirits v Doyle*, 72 Misc 2d 1036, affd 43 AD2d 880, *supra*), are the

very same interests which were identified by California in support of its resale price maintenance statutes. In *Midcal* (*supra*, pp 110-114), the Supreme Court determined that those State interests were subordinate to the Federal interest in enforcing a national policy favoring competition, as expressed through the Sherman Antitrust Act. While the court refused to rule out the possibility that those same State interests could, in a given case, prevail against the Federal interests in a competitive economy (*California Liq. Dealers v Midcal Aluminum*, *supra*, pp 113-114), nothing in the record before us causes us to conclude that this is such a case. In fact, the announced legislative assertion of policy that New York's resale price maintenance system for liquor furthers the State's interest in promoting temperance and an orderly market for alcoholic beverages (Alcoholic Beverage Control Law, § 101-bb, subd 1) has been undercut, to some degree, by studies concluding that resale price maintenance in this State is contrary to the American system of free enterprise and has had no significant effect upon the consumption of alcohol or upon the incidence of social problems related thereto (*Seagram & Sons v Hostetter*, 16 NY2d 47, 53-55, *affd* 384 US 35, 38-39, *reh den* 384 US 967; Moreland Comm Report No. 1, p 3; Moreland Comm Report No. 3, p 17; Governor's Liquor Control Recommendations, Feb. 10, 1964, NY Legis Ann, 1964, pp 484-489). Accordingly, we conclude that here, the Twenty-First Amendment does not shield the State from the provisions of the Sherman Antitrust Act.

We determine that subdivision 2 of section 101-bb of the Alcoholic Beverage Control Law is invalid as a violation of the Sherman Antitrust Act, and to the extent that our prior decisions are to the contrary, they are hereby overruled. In view of our holding, therefore, that portion of respondent's determination which found petitioner to have violated section 101-bb must be annulled.

Respondent also found that petitioner had violated subdivision 4 of section 63 of the Alcoholic Beverage Control Law, which prohibits persons licensed to sell liquor at retail for

off-premises consumption from engaging in any other business on the licensed premises. The evidence in this regard established that on December 18, 1979, respondent's investigators entered the licensed premises and observed displays of liquor with stuffed animals. They then purchased a gift package consisting of a bottle of Black and White Scotch and a stuffed animal for \$18. Morris Tarnofsky, president and sole stockholder of petitioner J.A.J. Liquor Store, testified that he had paid approximately \$8 for the stuffed animal and an additional sum for the wrapping paper and bow with which the gift package had been sold. At that time, he was selling the Black and White Scotch alone for \$8.99. Mr. Tarnofsky maintained that the stuffed animals were sold only as part of gift packages of liquor; he had never sold any of the animals separately and would not do so.

Based on the foregoing, we conclude that respondent's determination that petitioner had engaged in another business on the licensed premises was not supported by substantial evidence (CPLR 7803, subd 4; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230). It is uncontroverted that the stuffed animals were sold by petitioner at cost and only as part of gift packages of liquor. As such, the sale of these items constituted an inextricable part of his retail liquor business rather than a separate profit-generating business (*cf. Matter of Anchor Ligs. v State Liq. Auth.*, 31 AD2d 812, *apps dsmd* 26 NY2d 694). Accordingly, that portion of respondent's determination which found petitioner to have violated subdivision 4 of section 63 of the Alcoholic Beverage Control Law must also be annulled.

LAZER, J.P., THOMPSON and RUBIN, JJ., concur.

Petition granted, determination of the New York State Liquor Authority, dated June 1, 1981, annulled, on the law, with costs, and charges dismissed.

APPENDIX G

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE STATE OF NEW YORK, COUNTY OF NEW YORK
(MAY 24, 1985)

SUPREME COURT
 OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

Index No. 4014-83

FILED
 COUNTY CLERK
 NEW YORK COUNTY
 '85 MAY 24 P2:18

In the Matter of the Application of
 324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Petitioner,

For a Review Pursuant to Article 78
 of the Civil Practice Law and Rules

—against—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
 DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT
 OF THE UNITED STATES

Notice is hereby given that petitioner 324 Liquor Corp.,
 d/b/a Yorkshire Wine & Spirits, hereby appeals to the Su-
 preme Court of the United States from the final judgment in
 this proceeding of the Supreme Court of the State of New
 York, New York County, as reinstated by decision in this

proceeding of the Court of Appeals of the State of New York
 dated April 2, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Dated: May 24, 1985

/s/ SEYMOUR HOWARD (by MHB)

Seymour Howard
 380 North Broadway
 Jericho, New York 11753
 (516) 822-7770

—and—

BERTRAM M. KANTOR
 MICHAEL H. BYOWITZ
 WACHTELL, LIPTON, ROSEN & KATZ
 299 Park Avenue
 New York, New York 10171
 (212) 371-9200

Attorneys for Petitioner

APPENDIX HNOTICE OF APPEAL TO THE COURT OF APPEALS,
STATE OF NEW YORK (MAY 24, 1985)COURT OF APPEALS
STATE OF NEW YORK

No. 75

RECEIVED
MAY 25, 1985
COURT OF APPEALS

In the Matter of the Application of

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
*Petitioner-Respondent,*For a Review Pursuant to Article 78
of the Civil Practice Law and Rules

—against—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
*Respondents-Appellants.*NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that petitioner-respondent 324 Liquor Corp., d/b/a Yorkshire Wine & Spirits, hereby appeals to the Supreme Court of the United States from the final judgment in this proceeding of the Supreme Court of the State of New York, New York County, as reinstated by decision in this proceeding of the Court of Appeals of the State of New York dated April 2, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 24, 1985

/s/ SEYMOUR HOWARD (by MHB)Seymour Howard
380 North Broadway
Jericho, New York 11753
(516) 822-7770

—and—

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
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Attorneys for Petitioner-Respondent

APPENDIX I**THE SUPREMACY CLAUSE OF, AND § 2 OF THE
TWENTY-FIRST AMENDMENT TO,
THE CONSTITUTION OF THE UNITED STATES****Article VI, cl. 2:**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment XXI, § 2:

The transportation or importation into any State . . . of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

APPENDIX J**SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1**

Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

APPENDIX K**NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW,****§§ 101-bb (ENTIRETY) AND 101-b (EXCERPT)****(MCKINNEY 1970 AND 1984-85 SUPP.)****§ 101-bb. Prohibition against retail sales at less than cost**

1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of liquor for the purpose of fostering and promoting temperance in its consumption and respect for obedience to the law. In order to eliminate retail sales of liquor at less than cost which unduly disrupt the orderly sale and distribution of liquor, it is hereby declared as the policy of the state that the sale of liquor should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

(a) "liquor" shall mean liquor bearing a brand or trade name, and of like age and quality, which has been duly registered with and approved by the liquor authority pursuant to section 107A of this chapter, and

(b) "cost" shall mean the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor. As used in this paragraph (b) the term "price" shall mean the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred

one-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor; except, that where no applicable schedule is in effect the bottle price of the item of liquor shall be computed as the appropriate fraction of the case price of such item, before any discounts, most recently invoiced to the retailer.

3. Nothing contained in this section, however, shall prevent such licensee from selling, offering to sell or soliciting an order for such liquor at a price less than cost, provided that prior written permission therefor is granted by the authority for good cause shown and for reasons not inconsistent with the purpose of this chapter and under such terms and conditions as the authority deems necessary.

4. The authority is hereby authorized to promulgate rules which are necessary

(a) to carry out the purpose of this section and to prevent its circumvention;

(b) to permit the sale of liquor which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section;

(c) to permit the sale whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section.

5. For the violation of any provision of this section or of any rule duly promulgated under this section, the authority may: for a first offense, suspend a license for a period not exceeding ten days; for a second offense, suspend a license for

a period not exceeding thirty days; and for a third offense, suspend, cancel or revoke a license. In addition, for any such offense, the authority may recover, as provided in section one hundred twelve of this chapter, the penal sum of the bond filed by the licensee.

6. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, there shall be paid to the authority by each person hereafter applying for a license as manufacturer, wholesaler and retailer as hereinafter set forth, the following sums: distiller licensee or wholesale liquor licensee, sixty dollars; retail liquor licensee for off-premises consumption, ten dollars. A like sum shall be paid by each person hereafter applying for the renewal of any such license, and such sums shall accompany the application and the license fee prescribed by this chapter for such license or renewal thereof, as the case may be. The fees prescribed by this subdivision shall not be pro-rated for any portion of the license year and shall have no refund value.

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund

1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this

section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

. . . (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. . . .

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers. Where any schedule filed after the effective date hereof pursuant to paragraph (a) of this subdivision with respect to any

brand of liquor reflects a reduction or increase in the bottle or case price of any item set forth therein from the bottle or case price of such item theretofore in effect for the previous month, for the period during which the bottle and case price of any item set forth therein shall remain in effect, any schedule of prices to retailers filed by a wholesaler pursuant to this paragraph with respect to such item of liquor shall reflect, in the event of a decrease, a like reduction in percentum in the bottle or case price of such item set forth therein, and in the event of an increase, not more than a like increase in percentum in the bottle or case price of such item set forth therein. Nothing herein contained however shall prohibit changes in prices to retailers by a wholesaler for any item of liquor which changes are based on increased costs of labor or other operating costs, on the written permission of the authority, for good cause shown and for reasons not inconsistent with the purpose of this chapter. . . .

* * *

4. . . . Each such schedule required by paragraph (b) of subdivision three of this section shall be filed on or before the fifth day of each month, and the prices and discounts set forth therein shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. All schedules filed shall be subject to

public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

* * *

1

APPENDIX LNEW YORK ADMINISTRATIVE CODETIT. IX, § 65.4(e) (1980)

For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority.

APPENDIX M

NEW YORK STATE LIQUOR AUTHORITY
BULLETIN 471 (EXCERPT)

STATE OF NEW YORK
 LIQUOR AUTHORITY
 (Series 1973)
 Bulletin #471
 (Replaces Bulletin Series)
 June 29, 1973

TO: ALL MANUFACTURERS AND WHOLESALERS OF
 LIQUOR & WINE

SUBJECT: RULE 16—UNLAWFUL DISCRIMINATION AND
 PRICE SCHEDULING—BOTTLE PRICE DURING
 POST-DOWN

Under guidelines related to the Price Scheduling portion of this rule, there developed a situation during post-off periods which resulted in what became known as a "two bottle" price. The Authority has recognized this as undesirable, if not illegal.

With this Bulletin the Authority is therefore superceding its Bulletin #441 series. New guidelines for bottle pricing during post-offs are as follows:

METHODS OF SCHEDULING

Case prices may be posted off for any given month, or months, without an accompanying reduction in bottle prices. The wholesaler is given these choices during the period of a post-off:

1. May elect not to reduce the bottle price, in which case the legal bottle price will be the base for the 12% retail mark-up.

2. May reduce the bottle price to conform with the post-off case price, consistent with Rule 16.4 (e), in which case the reduced bottle price will be the base for the 12% mark-up.
3. May adopt a bottle price any where between the extremes authorized under "1" and "2" above, in which case the reduced bottle price will be the base for the 12% mark-up.

Under "2" and "3" split case sales *must* be made at the designated post-off bottle price. However, a wholesaler may restrict deliveries to at least a case of mixed items.

Wholesalers of liquor will note that pursuant to these changes no control is placed on the number of consecutive months during which post-offs may be scheduled.

EFFECTIVE DATE

This change is effective for Schedules of Liquor Prices to Retailers to be filed August 10th for September 1973 sales.

GENERAL GUIDELINES

Rule 16 was last amended November 3, 1971 when subsection 4 (e) was revised. Included in that change was the directive that the bottle price of any item listed in a wholesaler's Schedule of Liquor Prices to Retailers, multiplied by the number of containers in the case, *must* exceed the case price by approximately 96 cents for any case of 48 or fewer containers. (Guidelines are also listed relative to pricing where the case contains more than 48 containers).

* * *

CAUTION: ANY PRICE SCHEDULES FILED WHICH DO NOT CONFORM IN WHOLE OR IN PART WITH ALL THE PROVISIONS OF RULE 16, AS AMENDED, MAY SUBJECT THE FILERS TO DISCIPLINARY ACTION.

USE OF CODE LETTER ON POST-DOWN ITEMS

In listing prices of post-off items wholesalers should insert code letters following bottles price as indicated below:

- (H)—Bottle price not reduced
(Choice #1 above)
- (B)—Bottle price reduced full limit
(Choice #2 above)
- (M)—Bottle price between authorized limits
(Choice #3)

In each monthly Schedule of Liquor Prices to Retailers in which post-off items are offered, include on the top sheet the explanation of these code letters.

* * *

STATE LIQUOR AUTHORITY

/s/ BERTRAM D. SARAFAN

Bertram D. Sarafan
Chairman

APPENDIX NAFFIDAVIT OF SEYMOUR HOWARD
(DECEMBER 27, 1982) (EXCERPT)SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law and Rules,

—against—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Respondent.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NASSAU, ss.:

SEYMOUR HOWARD, being duly sworn, says:

I am the attorney for the Petitioner herein and make this affidavit in support of Petitioner's application for an Order to annul and set aside the determination and Order of the State Liquor Authority dated November 12, 1982.

1. The determination and Order referred to above found Petitioner guilty of violating section 101-bb of the Alcoholic Beverage Control Law of New York State (hereinafter referred

to as the "ABC Law") in that it advertised and sold two (2) brands of liquor below the legal minimum retail price, and fixed as a penalty a ten day suspension and ONE THOUSAND (\$1,000) DOLLAR fine.

2. The two brands of liquor involved in the sale were CHATHAM, 90 proof GIN (1.75 liter bottle) and SMIRNOFF VODKA, 80 proof (1.75 liter bottle). Petitioner's suppliers (wholesalers) of these brands were PEERLESS IMPORTERS, INC. and STAR INDUSTRIES INC., respectively. It should be noted here that PEERLESS IMPORTERS, INC. is the only wholesaler selling CHATHAM GIN to retailers in the New York Metropolitan area. In the New York Metropolitan area, three (3) wholesale houses, namely, STAR INDUSTRIES, CHARMER INDUSTRIES and PEERLESS IMPORTERS INC. sell SMIRNOFF VODKA to retailers.

* * *

5. Substantially, the pricing mechanism for the three (3) levels in the liquor industry in this state is as follows:

(a) Manufacturers and distillers file monthly schedules with the Liquor Authority which set forth their prices to wholesalers. With these schedules each is required to file an affirmation confirming that the prices charged are no higher than the lowest prices charged wholesalers in any other state (Section 101-b(3)(a) and (3)(d)).

(b) Wholesalers. When a wholesaler first obtains a brand to be carried and sold, he alone sets and files his "legal price" to retailers for that brand. No statute governs or controls that initial "legal price" fixed by a wholesaler and it can be as high or as low as the wholesaler desires without any standard or prohibitions or any review or approval by the State or Liquor Authority. Thereafter each month the wholesaler files schedules with the Liquor Authority which set forth that wholesaler's "case" and "bottle price" to retailers for all brands marketed by that wholesaler.

In any month after the initial filing a wholesaler may lower his "legal price" to retailers (commonly known as a "post-

off") without approval or review of the Liquor Authority, and may sell at his cost or even below cost.

* * *

On or about June 29, 1973, the Liquor Authority issued a directive Bulletin 471 which permits a wholesaler when filing a "post-off" on the case price of a brand to elect between three (3) alternatives effecting the "bottle price",

- (i) the wholesaler may pass the post-off through to the "bottle price" decreasing the "bottle price" proportionately with the "case price", or
- (ii) the wholesaler may "post-off" the "case price" without decreasing the "bottle price", or
- (iii) the wholesaler may fix the "bottle price" somewhere in the middle at its own discretion.

* * *

The only restriction on a wholesaler's price to retailers is that the Liquor Authority's consent must be obtained if the wholesaler wants to increase his price above the "legal price" for a brand of liquor.

Simply stated, the wholesaler, other than raising his price above the filed "legal price" to retailers, is free to price a brand at his own discretion without any control or supervision of the State or the State Liquor Authority.

It should be further noted that Section 101-b(4) provides that wholesalers' schedules of prices to retailers must be filed by the fifth day of the month to take effect on the first day of the following month. The schedules filed by all wholesalers are made available for inspection by other wholesalers who then have three (3) days to amend their schedule to meet a lower price for a brand of liquor.

(c) Retailers. The "bottle price" fixed by a wholesaler in his schedule for the month plus TWELVE (12%) percent of that price is the minimum retail price for that brand in that month below which a retailer purchasing from that wholesaler is prohibited from selling or advertising a brand.

Other than the statutory mandated TWELVE (12%) percent mark-up on the wholesaler's "bottle price" in any month (Section 101-bb(2) of the ABC Law) the State neither reviews, participates in, supervises or controls the price fixed by the wholesaler for a brand of liquor, and the wholesaler knowing of the TWELVE (12%) percent mandated mark-up is free to fix the minimum retail price for a brand of liquor in each and every month of the year.

As specific examples of this there is annexed hereto as Exhibit "A" copies of advertisements by various wholesalers published in the Licensed Beverage Journal, December 17-22, 1982 issue showing that these wholesalers have themselves fixed minimum retail bottle prices of various brands, not with the TWELVE (12%) percent minimum mark-up mandated by the legislature, but with minimum legal mark-ups based on the wholesalers unilaterally fixed "bottle prices" of 20% for E & J Brandy; 26.7% for a litre of CUTTY SARK Scotch; or 28.5% for a 750 ML of CUTTY SARK Scotch; 22.9% for a 1.75 litre bottle of FINLANDIA Vodka; 30% for a litre of FINLANDIA Vodka. One wholesaler, Knickerbocker Liquor Corp., advertises a program offering a legal minimum of 30% mark-up on a full line of spirits including nationally advertised brands of Scotch, Vodka, Cognac, etc.

These are glaring examples that the minimum retail prices of brands of liquor *are fixed* by wholesalers without any prohibition, review, restriction or control by the State.

The pricing of one of the brands involved in the instant matter is even more demonstrative of this fact.

SMIRNOFF Vodka is distributed by three wholesalers in the Metropolitan area, namely, Peerless Importers Inc., Charmer Industries and Star Industries. Petitioner's supplier of that brand was Star Industries. The schedule filed by Star for the month of June, 1981 (a copy of which is annexed hereto as Exhibit "B") shows that its "legal prices" for a 1.75 bottle of SMIRNOFF, 80 proof, Vodka was \$67.77 "case price" and \$11.62 "bottle price", which bottle price is the case price divided by six bottles, or \$11.30, plus the \$.32 cents for

breakage or split case, making \$11.62. In that month, Star "posted-off" that brand and fixed its "case price" at \$58.80, (reducing its legal "case price" by \$8.97) but did not fully pass through the post-off to its "bottle price", which it arbitrarily fixed at \$10.62. In addition, it offered a discount of 2% for purchases of five (5) or more cases. Using the arbitrarily fixed bottle price, the 12% mark-up mandated automatically sets the minimum retail price at \$11.89 per bottle.

The schedule filed by Charmer Industries for the same month (annexed hereto as Exhibit "C") shows that the "legal prices" posted by Charmer for that same brand are "case price" \$67.49 and "bottle price" \$11.57. Charmer also posted-off the brand and fixed a "case price" of \$60.56 (\$1.76 higher than Star), yet *arbitrarily fixed its "bottle price" at \$10.62*, the same as the price fixed by Star, resulting in the same minimum retail price for those retailers purchasing from Charmer.

The prices filed by Peerless for that month for the same brand were exactly the same as those filed by Star Industries.

The result was that although all three (3) wholesaler "posted-off" the "case price" for that brand in that month, the post-off was not fully passed through to the "bottle prices" which were the same in all three (3) instances resulting in a minimum retail price for that brand of \$11.89 for all retailers notwithstanding which of the three (3) was their individual supplier.

It should be noted that the minimum legal mark-up for any retailer buying one (1) case or more in that month for that brand was 17.6%.

Similarly, with regard to the other brand involved in this matter, Peerless offered a post-off on the "case price" of CHATHAM Gin, 80 proof, 1.75 litre bottle and did not pass through the full post-off to its "bottle price", thus, fixing a minimum legal mark-up for that brand in that month of 21.2% (a copy of the schedule is annexed hereto as Exhibit "D").

These mark-ups, arbitrarily fixed by the wholesalers, are only indicative of the fact that the minimum retail prices are fixed by a private party. Wholesalers in many instances "post-off" a "case price" and hold the "bottle price" at its "legal

price", or in many instances pass through the whole "post-off" to the "bottle price". The material point is that the wholesaler can "post-off" the price in any and every month and fix the legal minimum retail price by his action without any supervision, control, or review by the State.

It should be noted that for every major brand of liquor sold by more than one (1) wholesaler the "bottle price" in all schedules filed for a given month is the same (or within pennies) resulting in the same minimum retail price for all retailers. Without encumbering this record, a token example of this follows. For the month of December 1982, the schedules of prices to retailers filed by wholesalers handling the following brands in the Metropolitan area fixed the "bottle prices" for those brands as follows:

- 1) CUTTY SARK SCOTCH—80 proof, 1.75 liter bottle: Capitol Distributors, Charmer Industries, Peerless Importers and Knickerbocker Liquors Corp. all fixed the bottle price at \$20.17;
- 2) SMIRNOFF VODKA—80 proof, 1.75 liter bottle: Charmer Industries, Star Industries and Peerless Importers all fixed the "bottle price" at \$11.36;
- 3) GORDON'S GIN—80 proof, 1.75 liter bottle: Charmer Industries, Capitol Distributors, Knickerbocker Liquors Corp. and Star Industries all fixed the "bottle price" at \$11.60;
- 4) REMY MARTIN VSOP COGNAC—750 ML bottle; Peerless Importers, Charmer Industries, Knickerbocker Liquors Corp. and Star Industries all fixed the "bottle price" at \$19.24;
- 5) BACARDI RUM—80 proof, 1.75 liter bottle: Charmer Industries and Peerless Importers fixed their respective "bottle prices" at \$12.32.

* * *

Bulletin 471 issued June 29, 1973 permits a wholesaler three options with regard to the "bottle" price in a month when the

wholesaler posts-off the case price; the first to reduce the bottle price proportionately, the second, not to reduce the bottle price at all, or the third, to fix the bottle price anywhere between the extremes.

* * *

In the case of the Chatham Gin, the "case" price of \$47.77 should reflect a "bottle" price of \$7.96. The posted "bottle" price of \$9.65, (or \$57.90 for six bottles) results in a discount for a one case purchaser of 17.5%, not the maximum 2% permitted by Section 101-b.

As to the Smirnoff Vodka, the case price of \$58.80 should reflect a "bottle" price of \$9.80. The posted "bottle" price of \$10.62 (or \$63.72 for six bottles) results in a discount for a one case purchaser of 7.7%. In addition, the supplier offered a 2% discount for the purchase of 5 or more cases.

* * *

A purchaser of one case of the Chatham Gin at a price of \$47.77 or \$7.96 per bottle cannot sell below the scheduled "bottle" price of \$9.65 which results in a minimum markup not of 12% as mandated by the legislature, but 21.2%; and in the case of the Smirnoff Vodka the case buyer is restricted to a minimum 21.3% mark-up.

In this instant matter, if the full post-off's on the "case prices" had been passed through to the "bottle prices" for the brands involved, as they legally should have been, the minimum resale prices for those brands would have been for each,

CHATHAM GIN	— "Bottle price"	— \$7.96 + 12%	
	mark-up, \$.96	= \$8.92 M R P	and
SMIRNOFF VODKA	— "Bottle price"	— \$9.80 + 12%	
	mark-up, \$1.18	= \$10.98 M R P	

Both of those minimum prices are well below the actual prices of \$9.54 for CHATHAM GIN and \$11.59 for SMIRNOFF VODKA at which Petitioner advertised and sold these brands.

* * *

/s/ SEYMOUR HOWARD
Seymour Howard

Sworn to before this
27 day of December 1982.

/s/ MARY ANN ROSENBERG
Notary Public

MARY ANN ROSENBERG
Notary Public State of New York
No. 80-4638083
Qualified in Nassau County
Commission Expires March 30, 1983

[EXHIBITS A-D are reproduced on the following pages]

EXHIBIT "A"—ADVERTISEMENTS OF VARIOUS WHOLESALERS

Page Thirty-six

LICENSED BEVERAGE JOURNAL

December 17-23, 1982

EXTRA — EXTRA



E & J Brandy News



MASS DISPLAYS TO AMASS PROFITS THIS HOLIDAY SEASON



See your
Salesman
For this
NEW
Motion
Display



	<u>DEC.* CASE COST</u>	<u>Dec. Min. Resale</u>	<u>Profit Per Case</u>
750 ML	\$59.90	\$5.99	\$11.99
1 L	79.90	7.99	15.98

	<u>Dec. Min. Resale</u>	<u>Special National Min. Resale-Dec.</u>	<u>December Case Cost</u>	<u>MARK-UP</u>	<u>Profit Per Case</u>
1.75 L	\$14.99	\$12.99	\$64.95	20%	\$12.99

Enjoy Your Most Profitable Holiday Season Ever

Restaurants Please Note for your ordering convenience above product
is available through Premier Wine Distributors for on premise sales

*Includes 2% on 4 cases or more, 1% on 2-3 cases, ass't. sizes

GALLO WINE DISTRIBUTORS, INC.

Tel: 212-626-3787

914 AREAS — Southern Westchester 432-0100, Northern Westchester 768-5151
518 AREAS — Nassau 486-1900, Suffolk 273-0727, Suffolk (East of Speonk) 984-7388

BEST AVAILABLE COPY

Join Knickerbocker's

Christmas Club...



The state of the economy has made this a difficult year for retailers. To overcome increased costs and disappointing profit margins, liquor stores must use every means at their disposal during the Christmas season if they are to reach their hoped for profits in 1982.

Knickerbocker offers an immediate solution to that problem with 30% mark-ups on a full line of spirits, including prestigious, nationally advertised brands of Scotch, Vodka, Cognac, Liqueurs and others. Brands that are competitively priced to give you a tremendous

profit advantage when sold by the case to commercial accounts and holiday shoppers.

Our line is so versatile it offers unlimited opportunities to build big ticket sales on gift baskets and mix n' match ensembles where our 30% mark-up gives you extra dollars of profit with every order.

Now, when those extra dollars are needed more than ever, you owe it to yourself to stock, display and sell more of Knickerbocker's 30% brands.

Put them to work in your store and they could make this Christmas your most profitable ever!

"It's our business to  help your business."

KNICKERBOCKER LIQUORS CORP.

HOTEL & CLUB

PARK & TELFORD

FIVE BROS

KNICKERBOCKER

83A

LICENSED BEVERAGE JO

December 17-22, 198

Pages 14 and 15

HERE'S TO OPPORTUNITY AND THOSE WHO SEIZE IT.

Cutty Sark Leads New York With
Giant December Savings.

SIZE	1.75	LITRE	750 ML
REGULAR CASE PRICE	\$119.12	\$146.93	\$111.65
DECEMBER POST OFF	\$10.00	\$6.00	\$16.53
DECEMBER CASE PRICE*	\$106.94	\$138.12	\$93.22
MINIMUM CONSUMER RESALE	\$22.59	\$13.89	\$9.99
MINIMUM MARK-UP	26.7%	20.6%	28.5%

*Includes 2% quantity discount.



DISTRIBUTED BY: Capital Distributors: Charmar Industries: Peerless Importers: Knickerbocker Liquor Corp:
 Haeppeth Ben Perlow Alpine Hotel & Club
 Haeppauge Bluecrest Peerless Park & Tilford
 Hartdale Distilled Brands Webster Lawrence Five Boro
 Wine Imports Standard Food Sterling
 S.W.L. Gotham

Licensed Beverage Importer
 Dec. 17-22, 1942 - L. S. L.

BEST AVAILABLE COPY

THE WORLD'S FINEST VODKA OFFERS YOU NEW YORK'S FINEST PROFITS IN DECEMBER.



Extra profits on 750 ml.
Extraordinary profits on litres.

SIZE	80 PROOF 1.75 LITRE	80 PROOF LITRE	80 PROOF 750 ML.
DECEMBER CASE PRICE*	\$102.45	\$113.45	\$88.84
DECEMBER POST-OFF	\$6.00	\$12.00	\$12.00
DECEMBER SAVINGS*	\$8.09	\$14.32	\$13.81
DECEMBER RESALE	\$20.99	\$12.29	\$9.75
PROFIT PER BOTTLE	\$3.92	\$2.84	\$2.35
MINIMUM MARK-UP*	22.9%	30%	31.7%

*Includes 2% quantity discount.

IMPORTED FINLANDIA® THE WORLD'S FINEST VODKA™

Distributed by:

Capital Distributors:

Naspeth
Rangga
Rattakale
Wine Imports

Charm Industries:

Don Perlew
Rivcrest
Distilled Brands
Standard Food
S.W.L.

Peerless Importers:

Alpine
Peerless
Webster Lawrence
Sterling
Gotham

Kaickerbocker Liquor Corp:

Retail & Club
Park & Tifford
Five Bars

DISTILLED FROM GRAIN. 80 AND 100 PROOF VODKA. IMPORTED BY THE BUCKINGHAM CORP. N.Y.C.

*Licensed Beverage Dealer
Dec 17-22, 1964, 17 Ave*

EXHIBIT "B"—SCHEDULE OF PRICES FILED BY STAR INDUSTRIES

SCHEDULE OF LIQUOR PRICES TO RETAILERS

U.S. Dist. Reg. # Import Lic. & Brand Name	Size	Age of Neut. Spirit	Proof	Legal Price		Post Off. Price		of Btts. per Case	Discount to Quantity	Minimum Bottle Retail	
				per Bottle	per Case	per Bottle	per Case				
CONTINUATION OF DOMESTIC VODKAS											
#6521-900 GORDONS VODKA	SC 34	100%	100								
	1.75L B			10.95	63.77	10.75	62.56	6	2% 5+	12.04	
	1L B			6.16	72.01	6.15	71.86	12	ASSTD.	6.89	
	750ML B			4.85	56.28	4.77	55.30	12		5.54	
	500ML			3.21	75.11			24		3.60	
	200ML			1.47	68.51			48		1.65	
#6521-1609 MAJORSKA	SC 21		100								
	1.75L B			11.01	64.16	10.56	61.45	6	2% 5+	11.83	
	1L B			6.41	74.99	6.33	74.09	12	ASSTD.	7.09	
	750ML B			5.12	59.53	5.05	58.64	12		5.66	
	500ML B			3.31	77.53	3.21	75.11	24		3.60	
	200ML B			1.62	75.79	1.47	68.51	48		1.65	
#6521-1608 MAJORSKA	SC 21		80								
	1.75L B			9.03	52.27	8.87	51.31	6	2% 5+	9.53	
	1L B			5.14	59.71	5.13	59.63	12	ASSTD.	5.75	
	750ML B			3.95	45.50	3.94	45.41	12		4.41	
	500ML B			2.86	66.73	2.78	64.88	24		3.60	
	200ML B			1.33	62.12	1.28	59.69	48		1.65	
#6521-1679 OLD MR. BOSTON VODKA	SC 37		100								
	1L			5.79	67.61			12		6.43	
	750ML			4.73	54.82			12		5.30	
	500ML			3.04	71.04			24		3.40	
	200ML			1.42	66.06			48		1.59	
#6521-1579 OLD MR. BOSTON VODKA	SC 37		80								
	1L			5.20	60.52	4.99	57.97	12	2% 5+	5.59	
	750ML			4.06	46.74			12	ASSTD.	4.55	
	500ML			2.71	63.16			24		3.04	
	200ML			1.19	55.19	1.14	52.83	48		1.20	
#6521-803 SMIRNOFF VODKA	SC 26		100								
	1.75L B			13.87	81.31			6		15.53	
	1L B			8.17	96.11	8.15	95.91	12		9.13	
	750ML B			6.28	73.38	6.26	73.24	12		7.01	
	500ML			4.15	97.78			24		4.65	
	200ML			1.82	85.31			48		2.04	
#6521-863 SMIRNOFF VODKA	SC 26		80								
	1.75L H			11.62	67.77	10.62	58.80	6	2% 5+	11.39	
	1L H			6.82	79.91	6.74	77.48	12	ASSTD.	7.55	
	750ML H			5.23	60.78	5.23	59.53	12		5.86	
	500ML H			3.46	81.13	3.46	79.63	24		3.89	
	200ML H			1.48	68.91	1.48	67.41	48		1.66	
#6521-1735 SMIRNOFF DE CZAR	SC 26		82.6								
	750ML			9.96	117.57			12	2% 5+	11.16	
	500ML B			6.71	159.07	5.51	130.43	24	ASSTD.	6.17	
#6521-1709 SMIRNOFF SILVER LABEL (REG. & DEC. 1L)	SC 26		90.4								
	1.75L			12.96	75.83			6		14.52	
	1L			7.66	89.97			12		8.58	
	750ML			5.92	69.14			12		6.63	
	500ML B			3.99	93.94	3.98	93.55	24		4.46	
	200ML			1.70	79.62			48		1.90	

This schedule must be typed and printed

SCHEDULE OF LIQUOR PRICES TO RETAILERS

MINIMUM BOTTLE
RESALE

BRAND LABEL REG. # TYPE OF BEVERAGE & BRAND NAME	SIZE	BOTTLES PER CASE	LEGAL PRICE		POST OFF PRICE		# OF STYL. PER CASE	DISCOUNT FOR QUANTITY
			PER BOTTLE	PER CASE	PER BOTTLE	PER CASE		
DOMESTIC VODKA								
GORDON VODKA #6521-92 #72	1.75L 1 L 75CM 500M 200M	30.C.C	9.07 5.13 4.09 2.81 1.35	52.528 59.63H 47.198 65.478 63.058	8.87 5.12 3.54 2.80 1.23	51.31 58.63 45.41 65.36 62.01	6 12 12 24 48	23 5 -A- -A- -A- -A-
Z	1.6	EC.C	.39	44.87			12C	.44
GORDON VODKA #6521-900 #72	1.75L 1 L 75CM 500M PT 200M	100.C.C	10.95 6.16 4.85 3.22 2.57 1.47	63.778 72.013 58.288 75.298 69.368 68.51	10.75 6.15 4.77 3.22 2.84	62.56 71.86 55.30 75.25 66.34	6 12 12 24 24 48	23 512.04 -A- -A- -A- -A- -A-
SMIRNOFF DE Czar #6521-1735 #46	75CM 500M 200M	82.6	9.96 6.71	117.57 159.07			12 24	11.16 7.52
SMIRNOFF SILVER VODKA #6521-975 #46	1.75L 1 L 75CM 500M 200M	90.4	12.96 7.66 5.92 3.98 1.70	75.83 89.97 69.14 93.54 79.62			6 12 12 24 48	14.52 8.58 6.63 4.46 1.90
Z	1.6	90.4	.41	46.73			20	.46
SMIRNOFF VODKA #6521-863 #46	1.75L 1 L 75CM 500M 200M	80.C.C	11.57 6.74 5.23 3.46 1.42	67.498 78.588 60.788 81.138 68.518	10.62 6.74 5.23 3.46 1.48	60.56 77.48 59.53 79.63 67.41	6 12 12 24 48	23 511.89 -A- -A- -A- -A-
Z	1.6	80.C.C	.37	42.58			120	.41
SMIRNOFF VODKA #6521-803 #46	1.75L 1 L 75CM 500M 200M	100.C.C	13.67 8.17 6.27 4.15 1.82	81.31 96.118 73.378 97.78 85.31	8.15 6.26	95.91 73.24	6 12 12 24 48	15.53 5.13 7.01 4.65 2.04
RELSKA VODKA #6521-861 #47	1.75L 1 L 75CM 500M 200M	80.C.C	9.46 5.37 4.34 2.88 1.27	54.858 62.56 50.18 67.288 55.238	9.28	53.78	6 12 12 24 48	10.39 6.01 4.86 3.17 1.40
WOLFSCHEIDT VODKA #6521-1656 #81	1.75L 1 L 75CM 500M PT 200M	80.C.C	9.76 5.68 4.27 3.11 2.95 1.46	56.658 66.208 45.30 72.71 68.788 68.30	9.18 5.60 2.54	53.17 65.30 68.55	6 12 12 24 24 48	23 510.28 -A- -A- -A- -A- -A-

EXHIBIT "C"— SCHEDULE OF PRICES FILED BY CHARMER INDUSTRIES FOR

EXHIBIT "D"—PAGE FROM BEVERAGE MEDIA
PEERLESS IMPORTERS JUNE 1981 [EXCERPT]

Size	Bot.	Case	Resale	SAVE
VODKA				
VODKA—AMERICAN				

* * * * *

SMIRNOFF 80°					
20648	1.75	10.62	58.80	11.89	6.93
14281	1 L	6.74	77.48	7.55	1.50
78280	750	5.23	59.53	5.86	1.25
14290	500	3.46	79.63	3.88	1.50
66605	200	1.48	67.41	1.66	1.50
2% 5 cs. or more asst.					

* * * * *

16A—See Beginning of List for Codes, Discounts, Limitations

BEVERAGE MEDIA—JUNE, 1981

APPENDIX O

**VERIFIED PETITION, IN THE MATTER OF THE
APPLICATION OF 324 LIQUOR CORP., d/b/a
YORKSHIRE WINE & SPIRITS v. McLAUGHLIN
(DECEMBER 27, 1982) (EXCERPT)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

—
In the Matter of the Application of
324 LIQUOR CORP.,
d/b/a YORKSHIRE WINE & SPIRITS,
Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law and Rules,

—against—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT
DOYLE, TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Respondents.

—
VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner, by its attorney, SEYMOUR HOWARD, for its
Petition herein, alleges:

FIRST: Petitioner is a domestic corporation and maintains
its principal place of business at 324 East 86th Street, New
York, New York.

SECOND: At all times hereinafter mentioned, Petitioner was
and still is licensed under the laws of the State of New York to
sell liquors and wines at retail for off-premises consumption at
premises known as 324 East 86th Street, New York, New York.

THIRD: The Respondents, EDWARD J. McLAUGHLIN,
HUGH B. MARIUS, ROBERT DOYLE, TERRENCE R.
FLYNN, and FREDERICK PANNOZZO are commissioners
of the New York State Liquor Authority (hereinafter referred
to as the "AUTHORITY") appointed by the Governor of the
State of New York, which AUTHORITY was created and
exists under and pursuant to appropriate provisions of the
Alcoholic Beverage Control Law (hereinafter referred to as the
"ABC LAW") of the State of New York.

FOURTH: In June 1981, the AUTHORITY served a "Notice
of Pleading and Hearing" dated June 26, 1981 on the Peti-
tioner charging that the Petitioner had violated Section 101-bb
of the ABC LAW in that "it advertised and/or sold liquor at a
price less than cost on June 24, 1981." . . .

FIFTH: On July 6, 1981, Petitioner, by its attorney, in
writing pleaded "NOT GUILTY" to the charge alleged and
requested particulars as to the said charge. A copy of the letter
is annexed hereto as Exhibit "2".

SIXTH: By letter dated August 3, 1981 counsel for the
AUTHORITY served its Bill of Particulars upon Petitioner's
attorney. A copy of that Bill of Particulars is annexed hereto as
Exhibit "3".

SEVENTH: A hearing was held on January 20, 1982 at which
Petitioner stipulated that the advertisement annexed to the Bill
of Particulars was placed by Petitioner, and that investigators
employed by the AUTHORITY had purchased at Petitioner's
store on June 24, 1981 a 1.75 liter bottle of Chatham Gin, 92
proof, for \$9.54 plus sales tax, and a 1.75 litre bottle of
Smirnoff Vodka, 80 proof, for \$11.59 plus sales tax.

* * *

WHEREFORE, Petitioner prays for an order annulling the determinations of the Respondent, as contained in its order dated November 12, 1982, and for such other and further relief as to the court may seem just and proper.

DATED: Jericho, New York
December 27, 1982

Yours, etc.,

SEYMOUR HOWARD
Attorney for Petitioner
Office & P.O. Address
380 North Broadway
Jericho, New York 11753
(516) 822-7770

[EXHIBITS 2 and 3 are reproduced
on the following pages]

EXHIBIT "2"—LETTER DATED JULY 6, 1981
("Not Guilty" Plead and Demand For
Bill of Particulars)

July 6, 1981

State Liquor Authority
250 Broadway
New York, New York 10007

Attention: Warren B. Pesetsky, Counsel

Re: 324 Liquor Corp.
Yorkshire Wine & Spirits
Serial No. New York L 4967
Premises: 324 East 86th Street,
New York, New York 10028

Dear Mr. Pesetsky:

I have been retained to represent the above-named licensee with regard to the charge set forth in a notice of pleading and hearing dated June 26, 1981.

The licensee pleads "Not Guilty" to the charge set forth in that notice.

I would appreciate the following particulars regarding the alleged violation:

(1) What is the specific charge against the licensee; specify as to whether the licensee advertised liquor at a price less than cost on June 24, 1981, or sold liquor at a price less than cost on June 24, 1981.

(2) If the charge is that the licensee advertised in violation of Section 101-bb, set forth a copy of said advertisement(s).

(3) If the alleged violation is that the licensee sold liquor at a price less than cost, set forth the following:

(a) Name the brand and size of container allegedly sold by licensee;

- (b) What price was charged by the licensee;
- (c) Set forth who allegedly purchased said liquor;
- (d) From whom was it purchased;
- (e) What time of day did the transaction occur;
- (f) Set forth the minimum resale price of such product as claimed by the Authority;
- (g) Set forth a copy of the schedule of the licensee's supplier filed for the month of June 1981, which contains the brand allegedly sold in violation of Section 101-bb.
- (h) If the Authority will claim that an employee or agent of the Authority made a purchase, set forth the name of such employee or agent.

Very truly yours,

SEYMOUR HOWARD

SH:dd

EXHIBIT "3"—RESPONDENTS' BILL OF PARTICULARS

EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
250 Broadway, New York, N.Y. 10007

[SEAL]

August 3, 1981

Seymour S. Howard, Esq.
380 North Broadway
Jericho, New York 11758

Re: 324 Liquor Corp.
Yorkshire Wine & Spirits
324 E. 86th St.
New York, New York 10028
Serial No. NY L 4967

Dear Sir:

The following is the Authority's Bill of Particulars pursuant to your demand:

1. Both
2. Copy of advertisement enclosed.
3. 1.75 liter of 92 proof Chatham Gin was advertised at \$9.54 and was sold on 6/24/81 at about 2:00 P.M. by an unidentified female employee to SLA Investigator Levine for \$9.54 plus sales tax. The minimum resale price was then \$10.27 plus sales tax.
1.75 liter of 80 proof Smirnoff Vodka was advertised at \$11.59 and was sold on 6/24/81 at about 2 P.M. by an unidentified female employee to SLA Investigator Delgado for \$11.59 plus sales tax. The minimum resale price was then \$12.51 plus sales tax.

96A

Copies of the schedules of the licensee's supplier for the month of June 1981 are enclosed.

Very truly yours,

/s/ WARREN B. PESETSKY (HSP)
Warren B. Pesetsky
Counsel to the Authority

97A

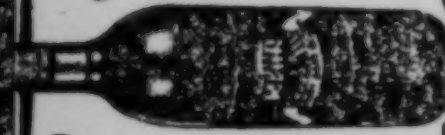
Wines and Spirits

WINE & LIQUOR DISCOUNT SUPERMARKET

CHATEAU BOTTLED 1978 WINES

- 1978 Chateau Cleris \$3.99
- 1978 Chateau La Mission
Haut Brion \$3.99
- 1978 Chateau Mouton
Rothschild \$3.99
- 1978 Chateau Lafite
Rothschild \$3.99
- 1978 Chateau Haut Brion \$3.99
- 1978 Chateau Maresca \$3.99

QUANTITIES LIMITED



CALIFORNIA CABERNET SAUVIGNON

- 1978 Keenan Napa Valley \$1.99
- 1978 Durney Vineyards \$1.99
- 1977 Burgess \$1.99
- 1976 Freemark Abbey \$1.99
- 1976 Jordan \$1.99
- 1974 R. Mondavi \$1.99
- 1974 B.V. Georges De Latour
(Private Reserve) \$1.99

QUANTITIES LIMITED



CALIFORNIA CHARDONNAY

- 1979 Callaway Vineyards \$3.99
- 1979 J. & W. Vineyards \$3.99
- 1979 Ventana Vineyards
(Monterey) \$3.99
- 1979 Edna Valley \$3.99
- 1979 Sta. Chapelle Vineyards \$3.99
- 1978 Freemark Abbey \$3.99
- 1978 R. Mondavi (Reserve) \$3.99

QUANTITIES LIMITED

Prices effective 'til June 30. In case of typographical error, lowest price permitted by law will prevail. All items subject to inventory depletion. We reserve the right to limit quantities per person.

Wine & Liquor Discount Supermarket
324 East 86th St., N.Y.
Wines & Spirits (Between 1st & 2nd Aves.) **249-2300**

APPENDIX P**NUMBER OF RETAIL PACKAGE STORES****IN THE STATE OF NEW YORK****(1970 - 1979)***

<i>Year</i>	<i>Number of Off-Premise Liquor Stores in State of New York</i>
1970	5,257
1971	5,070
1972	4,960
1973	4,885
1974	4,744
1975	4,720
1976	4,666
1977	4,587
1978	4,459
1979	4,395

* The figures for each year set forth below were taken from the 1970-1980 editions of *The Liquor Handbook*, a publication of Jobson Publishing Co. To our knowledge, no data for years subsequent to 1979 are currently available.

Stolichnaya

The Profit Vodka



"The Marriot prides itself on first class accommodations. Our customers expect it. We proudly feature Stolichnaya on our back bar."

John Kolakowski
Beverage Manager
Marriot Hotel



"Imported vodka has put real profit into Vodka sales and Stolichnaya leads the way. I floor stock my Stoli."

Frank Velani
Owner
Columbus Circle
Wine & Liquor

BEST AVAILABLE COPY

100A

APPENDIX Q

LICENSED BEVERAGE JOURNAL, JUNE 21, 1985 AT 11

Kick Off Summer With
Stolichnaya
The Profit Litre!

MAY CASE
\$142.10

JUNE CASE
\$128.10

**SAVE
\$14.00**

BOTTLE COST
\$10.47
RESALE
\$13.44

**MARK-UP
28.5%***

Profit Per Bottle — \$2.97*

*Includes Quantity Discount



CONTACT
YOUR
STOLICHNAYA
DISTRIBUTOR

Stolichnaya "ULTRA TOUCH" Shirt Offer

BUY IN AUGUST

EARN EXTRA PROFIT

IN SEPTEMBER



TANQUERAY 1.75L

August No. 1 Retailer Case Cost	September Retailer Case Cost	August Savings	September 12% Resale No. 2	September 12% Resale No. 1	Profit Per Case	Profit Per Bottle
\$102 ⁰²	\$117 ⁶⁸	\$15 ⁶⁶	\$22 ³²	\$31 ⁹⁰	31.3%	\$5 ³¹

No. 1 Plus quantity discount; 2% 5 cases, assorted sizes

No. 2 Outside N.Y. City suggested 12% resale

MOTION

No. 84-2022

Supreme Court, U.S.

FILED

AUG 30 1985

JOSEPH F. SPANGLER, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

324 LIQUOR CORP., d/b/a
YORKSHIRE WINE & SPIRITS,

Appellant,

— against —

THOMAS DUFFY, ANNE GLADWIN,
ROBERT DOYLE, TERRENCE R. FLYNN
and FREDERICK PANNOZZO,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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*Assistant Attorneys General
Of Counsel*

BEST AVAILABLE COPY

Questions Presented*

1. Is New York's strong public policy interest in protecting small retailers and consumers, as reflected in the State's minimum 12 percent mark-up retail liquor price statute, authorized by the Twenty-first Amendment?

2. Is New York's minimum mark-up retail liquor price statute consistent with the Sherman Act?

3. Even assuming, *arguendo*, New York's minimum mark-up retail liquor price statute is in conflict with the Sherman Act, is the statute nevertheless immune under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943)?

* Thomas Duffy and Anne Gladwin have succeeded Edward J. McLaughlin and Hugh B. Marius as Commissioners of the New York State Liquor Authority. The caption reflects this change.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

324 LIQUOR CORP., d/b/a
YORKSHIRE WINE & SPIRITS,

Appellant,

— against —

THOMAS DUFFY, ANNE GLADWIN,
ROBERT DOYLE, TERRENCE R. FLYNN
and FREDERICK PANNOZZO,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Thomas Duffy, Anne Gladwin, Robert Doyle, Terrence R. Flynn and Frederick Pannozzo, Commissioners of the New York State Liquor Authority ("SLA"), move to dismiss or affirm on the ground this appeal fails to present a substantial federal question and the decision of the court below is so obviously correct as to warrant no further review.

Statement of the Case

The appellees adopt and rely on the facts and statutory analysis set forth in item "II" of the majority opinion below.

(6A-8A).^{*} Contrary to the assertion by appellant in its statement of the case (J.S.4),^{**} New York's Alcoholic Beverage Control Law ("ABC Law") § 101-bb does not authorize "wholesalers to establish minimum retail prices." ABC Law § 101-bb mandates that liquor not be sold at retail at "less than cost." "Cost" is defined by statute as "the price of such item to the retailer plus twelve percentum..." "Price" is defined by statute as "the bottle price to retailers, before any discounts, contained in the applicable monthly schedule" filed with the liquor authority by the wholesaler containing his own price to his own customers.

The SLA monitors and can correct undesirable market conditions through the implementation of various provisions of the liquor pricing statutory scheme. For example, ABC Law 101-bb(3) gives the SLA authority to grant deviations from the minimum mark-up upon a showing of "good cause." ABC Law 101-b(3)(b) permits wholesalers to obtain approval from the SLA to "pass through" increases in labor or other operating costs. ABC Law 101-b(3)(d) requires that distillers affirm that their prices to New York wholesalers are no higher than their prices in other states; and, under ABC Law 101-b(3)(b), wholesalers may raise their prices to retailers no higher than in direct proportion to any increases from the distillers to the wholesalers. In addition to these statutory provisions, the SLA, through such devices as Bulletin 471 (which seeks to prevent a "two bottle" price)(24A), regularly re-examines market prices and conditions.

Thus, although the wholesaler determines his own prices, the relationship between his own prices and the minimum price a retailer may charge is dictated by statute and not by any arrangement between the parties. Although the wholesaler, knowing what his own price is, may calculate what the minimum retail price will be, this knowledge is not the fruit of a forbidden resale price maintenance agreement but a simple calculation under a minimum retail price formula mandated not by wholesalers but by the State.

^{*} References to pages in the appendix to the Jurisdictional Statement are indicated as (-A).

^{**} References to pages in the Jurisdictional Statement are indicated as (J.S. -).

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The New York Court of Appeals Properly Held That New York ABC Law § 101-bb Is Consistent With The Twenty-first Amendment.

The appellant has failed to raise a substantial federal question to cast doubt that New York's minimum mark-up retail liquor price statute, which is similar to "below cost" statutes upheld in courts across the country, is a valid exercise under the Twenty-first Amendment of a strong state interest in maintaining competition in the liquor industry. New York's statute does not conflict with federal antitrust law and is otherwise exempted from the prohibitions of such law under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). Moreover, appellant has failed to show any similarity between New York's law and the California price maintenance law struck down by this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980). The decision below should be affirmed, or the appeal dismissed.

The Twenty-first Amendment provides the states with "wide latitude" in regulating the sale and distribution of alcoholic beverages within their respective borders. *Joseph E. Seagram & Sons v. Hostetter*, 385 U.S. 35, 42 (1966). This wide latitude "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *California Retail Liquor Dealers v. Midcal*, 445 U.S. 97, 107 (1980). Although Congress has retained the right to regulate interstate commerce in the sale and distribution of alcoholic beverages, the rights of the states under the Twenty-first Amendment and those of Congress under the commerce clause "must be considered in light of each other ... in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

In resolving disputes under these respective rights, the courts must determine whether, notwithstanding a conflict, the state's

regulation is "so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail ..." *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984) (quoting *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 [1984]). A "pragmatic effort [must be made] to harmonize state and federal powers." *Midcal*, 445 U.S. at 109. In this balancing process, "respectful consideration and great weight" are given "to the views of the state's highest court." *Midcal*, 445 U.S. at 111 (quoting *Indiana, ex rel. Anderson v. Brand*, 303 U.S. 95, 100 [1938]).

The Court of Appeals correctly observed below that the legislative history of ABC Law § 101-bb, and the ABC laws in general, evidence an intention on the part of New York to "preserve competition" and protect the retail liquor market from the predatory practices of large retailers. (13A).^{*} As found below, this state interest is consistent with federal antitrust policy (17A). There is no "competing" federal interest against which New York's policy need be weighed. See *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985).^{**}

^{*} This Court has previously reviewed the history of New York's regulatory scheme concerning alcoholic beverages. See, *Joseph E. Seagram & Sons v. State Liquor Authority*, 384 U.S. 35 (1966), affg, 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965). See also: *Matter of Hub Wine & Liquor v. State Liquor Authority*, 16 N.Y.2d 11, 209 N.E.2d 701, 126 N.Y.S.2d 75 (1966); *Matter of Great Eastern Liquor Corp. v. State Liquor Authority*, 25 N.Y.2d 525, 295 N.E.2d 704, 307 N.Y.S.2d 441 (1970), affg, 30 A.D.2d 307, 291 N.Y.S.2d 715 (2d Dep't 1968); *Moreland Commission Report*, N.Y. Leg. Ann., 1964, pp. 484-489.

^{**} This Court has only recently again emphasized the concept of federalism, the deference owed to the state legislatures and judiciary, and the need to avoid federal court determinations of state interest and interference with state regulatory schemes. *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985). Such deference to the states is particularly appropriate where the Twenty first Amendment is involved. On this basis alone, there is no substantial question but that ABC Law § 101-bb is authorized by the Twenty-first Amendment and should be upheld.

The Court of Appeals properly found that even if such a conflict existed, the State interest behind ABC Law § 101-bb, evidenced by its legislative history, is sufficiently strong as to otherwise retain the broad protection of the Twenty-First Amendment. In 1964, as the result of a legislative investigation of anticompetitive and anticonsumer practices in the liquor industry, New York enacted sweeping changes in its liquor laws (L. 1964, ch. 531), including the elimination of retail liquor sales at "less than cost." Subsequent legislative investigation found that, despite the "less than cost" provisions of former § 101-bb, there continued significant pricecutting and promotion, threatening the very heart of the retail liquor business in New York (14A). In 1971, ABC Law § 101-bb was amended to require a minimum retail mark-up of twelve percent above the "price" paid by the retailer. "Price" to the retailer is statutorily defined as the wholesaler's prices to its customers as reflected in his bottle prices "posted" with the liquor authority under a monthly filing or scheduling procedure which has been upheld by the courts as consistent with federal antitrust laws. *Battipaglia v. New York State Liquor Authority*, 745 F.2d at 172; *Admiral Wine and Liquor v. State Liquor Authority*, 61 N.Y.2d 858, 462 N.E.2d 146, 473 N.Y.S.2d 969 (1984). This change in statute was directly intended to prevent the threat to small retailers from a "relatively few". (15A). This pro-competitive purpose was unequivocally upheld by the New York Courts as a vital state interest. *House of Spirits v. Doyle*, 36 N.Y.2d 815, 331 N.E.2d 680, 370 N.Y.S.2d 899 (1975), affg, 43 A.D.2d 880, 352 N.Y.S.2d 588 (3d Dep't 1974), affg, 72 M.2d 1036, 339 N.Y.S.2d 495 (Sup. Ct. App. Div. 1st Dep't 1973). Appellant has failed to make any showing that the effect of the implementation of this strong state interest by means of a statutorily mandated minimum mark-up statute violates any federal antitrust policy or is otherwise inconsistent with the broad power of New York to control liquor prices in the State under its core power to enforce the Twenty first Amendment.

One of the fallacies in appellant's position is that appellant fails to recognize that New York, unlike California in *Midcal*,* has a strong "state interest" in protecting small liquor retail dealers. New York's strong interest in protecting small retailers through pricing and other regulations is in direct contrast to the weak state policy found by this Court when it struck down certain retail wine price maintenance statutes in *Midcal* which on their face conflicted with federal antitrust laws.** New York, however, has vigorously defended its vital state interest, as set forth in ABC Law § 101-bb, in both this case and *House of Spirits v. Doyle*.

* The state agency responsible for administering the California resale price maintenance program did not appeal the decision of the California Court of Appeals. *Midcal*, 445 U.S. at 11 n.12. Furthermore, the only purported state interests advanced by the California Attorney General, who simply filed an *amicus curiae* brief in support of the program, were "unsubstantial." *Id.* at 114.

** As shown here (pp. 7-8), while the resale price maintenance agreements found in *Midcal* constitute *per se* violations of the Sherman Act, the statutory minimum mark-up provisions of ABC Law § 101-bb neither authorize nor permit such conduct and are similar to minimum mark-up statutes upheld across the country. Thus, not only is New York's state interest behind the law consistent with federal policy, but the manner in which that policy is carried out has been repeatedly upheld under federal law. While appellant concedes (J.S. 22 n. 30) that more than thirty states have enacted statutes prohibiting below cost sales, it attempts to distinguish them from ABC Law § 101-bb because they may define "cost" in a different manner from New York's definition. This is a classic "distinction without a difference." Regardless of the definition of the cost basis under the various statutes, each is analogous to the New York statute in that while the wholesaler's "price" to his retailers plays a part in determining the minimum retail price, this unilateral action occurs solely by operation of statute, and not as the result of any combination or conspiracy.

B. ABC Law § 101-bb is not in conflict with the federal antitrust laws.

The majority below impliedly found and the concurring opinion expressly declared (J.S. App. at 19A) that ABC Law § 101-bb does not conflict with federal antitrust laws.* The Sherman Act, Section 1, 15 U.S.C. 1, prohibits only "contract[s], combination[s]...or conspirac[ies]" in restraint of trade. It makes a crucial distinction between concerted and unilateral action. *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731, 2740 (1984); see also: *Battipaglia v. New York State Liquor Authority*, 745 F.2d at 172; *Admiral Wine & Liquor Merchants v. State Liquor Authority*, 61 N.Y.2d at 859, 461 N.E.2d at 147, 473 N.Y.S.2d at 970. A state statute runs afoul of the Sherman Act "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws..." *Rice v. Norman Williams*, 458 U.S. 654, 661 (1982). Absent a mandate or authorization for *per se* violations of federal antitrust law, a state statute does not violate the Sherman Act merely because the law may have an anti-competitive effect. *Rice v. Norman Williams*, 458 U.S. 654, 659 (1982).

In this case, the concurring opinion correctly noted, although a wholesaler may freely set its own liquor prices under New York's regulatory scheme, the laws do not "mandate" or "authorize" him to conspire to set the prices of others. ABC Law § 101-bb requires that the wholesaler's posted prices become the "cost" basis to which the retailer must add at least 12 percent to the retail price.

* While the majority below noted (8A) that it need not address the issue of whether § 101-bb violates the antitrust laws if the court were to conclude (as it did) that the statute was permitted by the twenty-first amendment, nevertheless, the court went on to say (11A) that "the principal purposes of the legislation [behind New York's regulation of alcoholic beverages] ... and which is now challenged on antitrust grounds were the same as those underlying the Sherman Act -- to promote market competition and protect consumers." The majority below also concluded that the state interest underlying ABC Law § 101-bb not only "is of sufficient magnitude to override federal [antitrust] policy ... but also that the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with federal statutes." (17A)

This is not the result of concerted conduct but "occurs only because the State has dictated the mark-ups..." *Morgan v. Division of Liquor Control*, 512 F.Supp. at 939. Federal courts have repeatedly recognized the non-conspiratorial aspect of minimum mark-up statutes as opposed to retail price maintenance agreements. See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), *aff'g*, 512 F.Supp. 936 (D. Conn.); *Miller v. Hedlund*, 579 F.Supp. 116 (D. Ore. 1984), *appeal docketed*, No. 84-3549 (9th Cir. Apr. 12, 1985); *Fisher Goods, Inc. v. Ohio Department of Liquor Control*, 555 F.Supp. 641 (N.D. Ohio 1982); *Little Rock School District v. Borden, Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63, 493 (E.D. Ark. Aug. 5, 1980); *Schnapps Shop, Inc. v. H.W. Wright & Co.*, 377 F.Supp. 570 (D.Md. 1973); *Walker v. Bruno's Inc.*, 650 S.W.2d 357 (Tenn. 1983); *George W. Cochran Co. v. Comptroller*, 292 Md.3, 437 A.2d 194 (1981); *accord*, *Baseline Liquors v. Circle K Corp.*, 129 Ariz. 215, 630 P.2d 38 (Ct. App.) *cert denied*, 454 U.S. 969 (1981).

The appellant, in relying upon *Midcal*, fails to recognize the critical differences between the California statute in that case and the one here. New York's statute, unlike California's, is supported by a strong state interest and is in conformity with federal antitrust policy. The California resale price maintenance statute struck down in *Midcal* — unlike ABC Law § 101-bb(2) — permitted wine producers to file with the state a schedule of wholesalers' prices arrived at by fair trade agreement, thereby fixing the specific prices wholesalers must charge their retailers.* In the event a producer failed to provide such an agreement and price schedule, any wholesaler by filing a schedule of his prices to retailers could bind *all* wholesalers in the district, whether they were willing or not, to sell to their retailers at the same prices. Thus, price competition on the wholesale level was eliminated. *Midcal*, 445 U.S. at 103; see *Rice v. Norman Williams*, 458 U.S. at 659; *Battipaglia v. New York State Liquor Authority*,

* A New York statute, ABC Law § 101-bbb similar to the *Midcal* statute, was struck down by the New York Court of Appeals in *Matter of Menchetti Associates v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791, 432 N.Y.S.2d 372 (N.Y. 1981), on the basis on the *Midcal* decision.

745 F.2d at 171; *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 514 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984).*

The statute now before this Court is a minimum percentage mark-up statute and not a price maintenance law. Neither ABC Law §§ 101-b(3) nor 101-bb permits a producer or wholesaler to set anyone else's wholesale or retail prices, as in *Midcal*. Each sets only his own prices. See *Battipaglia v. New York State Liquor Authority*, 745 F.2d at 172; *Admiral Wine & Liquor v. State Liquor Authority*, 61 N.Y.2d at 859, 462 N.E.2d at 147, 473 N.Y.S.2d at 970. The retailer, under the statute, may charge any price above the minimum statutory mark-up. The price schedule filed by one wholesaler has no binding impact under the statute on the scheduled prices filed by another wholesaler, and has no impact on retail prices except as flow from the operation of the statutorily mandated minimum 12 percent mark-up on retail prices. Although a particular wholesaler's scheduled prices constitute the statutorily defined "cost" basis to which the 12 percent is added, the wholesaler's knowledge of the mechanics of how the 12 percent mark-up will affect the minimum retail prices of his retailers does not constitute an illegal contract, combination or conspiracy. See *Morgan v. Division of Liquor Control*, 512 F.Supp. at 939.

C. ABC Law § 101-bb is direct "state action," which is exempt from the prohibition of federal antitrust laws.

In *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984), this Court amplified and clarified the "state action" doctrine originally enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), in cases where alleged anticompetitive activity is challenged as violative of the Sherman Act. Where the conduct challenged "is that of the sovereign itself," either the state legislature or the state's highest court, such conduct is *ipso facto* protected from challenge under

* Appellant cites (J.S. 23), *Lewis Westro & Co. v. Alcoholic Beverage Control Appeals Board*, 186 Cal. 552, 136 Cal. App.3d 629 (1982), *cert. denied*, 104 S. Ct. 103 (1983), in which the California court struck down a wine pricing law on antitrust grounds. *Enrico's* upheld the same law as not violative of federal antitrust law, observing that *Lewis Westro* was decided primarily on state precedent.

the federal antitrust laws. *Hoover v. Ronwin*, 104 S. Ct. at 1995-96. Here, it is the State of New York — not private parties — which has mandated that retailers not sell liquor at less than 12 percent above "cost," and it is the State which has statutorily defined "cost." This is direct state action and, even assuming *arguendo*, it is anticompetitive, it is *per se* protected from antitrust challenge.*

The "two-pronged" *Midcal* state action test (clearly articulated state policy which is actively supervised by the State) has no application here. It applies only where the state has authorized individuals to engage in conduct which, but for the authorization, would violate the antitrust laws. *Hoover v. Ronwin*, 104 S. Ct. at 1995. In this case, ABC Law § 101-bb on its face authorizes no activity in violation of the Sherman Act. If there is any anticompetitive impact resulting from ABC Law § 101-bb, it is the direct result of State action.

Even assuming *arguendo*, the two-pronged *Midcal* state action test were applicable, that test is met for the reasons set forth in the concurring opinion below. (24-25A). The "active supervision" aspect of the *Midcal* test is further strengthened by the requirements of ABC Law § 101-b(3)(d) and (g), which require a liquor distiller to affirm on a monthly basis that its prices to its customers in New York are no higher than its prices, including discounts, elsewhere in the county. Thus, as in *Morgan*, the statutory scheme of which the challenged provision is a part, regulates on a monthly basis pricing on all three levels of distribution, i.e., distiller, wholesaler and retailer. This is "active supervision" by the State over liquor pricing in New York.

* While the concurring opinion below (22A-25A), in a well reasoned opinion, recognized the applicability of the "state action" exemption here, the majority did not.

CONCLUSION

As appellants have failed to raise a substantial federal question, and the decision of the court below is so obviously correct as to warrant no further review, this court should dismiss the appeal or affirm.

Dated: New York, New York
August 29, 1985

Respectfully submitted,

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REPLY
BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM 1984

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,

—v.—

THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN and FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

**BRIEF IN OPPOSITION TO MOTION
TO DISMISS OR AFFIRM**

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1. Section 101-bb Clearly Authorizes Wholesalers To Fix Retail Prices In Violation Of The Sherman Act

The SLA contends that Section 101-bb does not authorize wholesalers to establish minimum retail prices in that the statute merely prohibits the sale of liquor by retailers for off-premises consumption at a price "less than cost" with "cost" defined in terms of a 12 percent minimum mark-up above the wholesaler's "bottle price" (Mo. 2). The record in this case establishes, however, that Section 101-bb is in fact a statutory authorization for New York wholesalers to control minimum retail liquor prices (JS 4-5, 11-13), as even the court below recognized (JS 9A-10A).

Even the SLA does not dispute that Section 101-bb empowers liquor wholesalers to set two distinct prices which need bear no relation to each other: a "case price" which is the wholesaler's invoice price and a phantom "bottle price" which provides the base for computing the minimum retail price (JS 4-5, 12-13). Because the record in this case establishes that New York wholesalers vie in manipulating case and bottle prices so as to produce mark-ups for retailers as high as 20 to 30 percent over actual cost (JS 5, 77A-79A, 82A-86A), Section 101-bb cannot accurately be described as either a "below cost" statute or a minimum mark-up statute (JS 12-13).

Lower court precedents which reject antitrust challenges to real minimum mark-up statutes can lend no support to the SLA's claims. Under the true minimum mark-up statutes at issue in the cases upon which the SLA relies (Mo. 7-8), manufacturers or wholesalers were authorized to set only one price, an invoice price. Since no manufacturer or wholesaler had discretion to control resale prices, the lower courts held that the restraint was imposed directly by the state and therefore did not involve concerted action as required under Section 1 of the Sherman Act.¹

¹ See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); *Little Rock School District v. Borden*, 1980-2 Trade Cases (CCH) ¶ 63,493 at 76,618 (E.D. Ark. 1980).

These cases have no application here in light of the Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). After *Midcal*, it cannot be disputed that when a state by statute authorizes a private party to control its distributors' resale liquor prices in its unfettered discretion and without state supervision, the statute is invalid under the Supremacy Clause in that it sanctions *per se* violations of the Sherman Act. Because Section 101-bb authorizes wholesalers to set two distinct prices and to manipulate the difference between those prices to guarantee supra-competitive profits to its retailers (JS 4-5, 11-13), the wholesaler clearly "holds the power to prevent price competition by dictating the prices charged by" retailers (445 U.S. at 103). Therefore, Section 101-bb falls squarely within the class of state statutes condemned by this Court's holding in *Midcal*.

New York seeks to distinguish *Midcal* by claiming that California's statute authorized a wholesaler to bind all other wholesalers in an area, while the New York statute does not authorize price restraints of any kind (Mo. 8-9). This argument cannot withstand analysis. *Midcal* makes only passing reference to the horizontal aspects of California's statute. 445 U.S. at 100. The Court struck down the statute as a *per se* violation of the Sherman Act because it empowered wine *producers* to control the prices of their respective *wholesalers*. *Id.* at 102-03. Thus, *Midcal* stands squarely for the proposition that a state statute which sanctions resale price maintenance is invalid under the Sherman Act. Since, as already demonstrated (JS 11-13 and p. 2, *supra*), the New York statute also authorizes resale price maintenance, *Midcal* clearly controls here.

2. The Court Below Correctly Rejected The Claim That Section 101-bb Is "State Action" Immune From Antitrust Challenge

The SLA contends that even if the Court finds Section 101-bb to be anti-competitive, the statute is nonetheless saved from invalidation by the "state action" doctrine. New York's

Attorney General advances this argument even though it was expressly rejected by New York's highest court (JS 9A-10A) and despite the fact that his client has not asked the Court to review any aspect of the decision below.

The Court of Appeals rejected "state action" immunity under one of the governing standards articulated in *Midcal*: that the challenged restraint "must be 'actively supervised' by the state itself" (JS 9A) (*quoting* 445 U.S. at 105). Unable to offer any persuasive basis to dispute the finding of its highest court that New York resale "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (JS 10A), New York seeks refuge under this Court's decision in *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). Because the instant case involves a "private price-fixing agreement authorized by [the] State" rather than one in which "the conduct at issue is in fact that of the state legislature or supreme court" (*id.* at 1995, 1996), the SLA's claim that this case is controlled by *Ronwin* rather than *Midcal* must be rejected.

3. The Twenty-First Amendment Does Not Save Section 101-bb From Invalidity Under The Sherman Act

The Court has held that when a state statute challenged as in conflict with the federal antitrust laws is defended under § 2 of the Twenty-first Amendment, the competing federal and state interests must be balanced to determine "after careful scrutiny" which interest should prevail. *Midcal*, 445 U.S. at 110. While paying lip service to the *Midcal* balancing test (Mo. 3-4), the SLA responds with unsubstantiated contentions that the New York statute "does not conflict with federal antitrust law" and is consistent with the Twenty-first Amendment (Mo. 3). These bald assertions do not even begin to rebut appellant's showing in the Jurisdictional Statement that Section 101-bb is at war with the Sherman Act (JS 15-18) and that under *Midcal* the profound federal interest in a vigorously competitive economy is not outweighed by the unsubstantiated state in-

terest asserted in this case, which can be served better by less anti-competitive alternatives and which is not at the core of the Twenty-first Amendment (JS 18-26).

For the reasons set forth above and in the Jurisdictional Statement, the decision of the New York Court of Appeals in this case should be summarily reversed or, alternatively, the Court should note probable jurisdiction and set the case down for oral argument.

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Dated: September 3, 1985

AMICUS CURIAE

BRIEF

No. 84-2022

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

324 LIQUOR CORP., DBA YORKSHIRE WINE &
SPIRITS, APPELLANT

v.

EDWARD J. McLAUGHLIN, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Whether New York State's Alcoholic Beverage Control Law § 101-bb (McKinney 1970 & Supp. 1986) is inconsistent with the Sherman Act.

2. If so, whether the state action doctrine immunizes the statutory scheme from Sherman Act challenge.

3. Whether the statute is immune from Sherman Act challenge because Section 2 of the Twenty-first Amendment supersedes Congress's powers under the Commerce Clause with respect to this form of state regulation of intoxicating liquors.

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In the Supreme Court of the United States

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No. 84-2022

324 LIQUOR CORP., DBA YORKSHIRE WINE &
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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Section 101-b(3) of the New York Alcoholic Beverage Control Law (ABC Law) (N.Y. Alco. Bev. Cont. Law (McKinney 1970) [hereinafter all refer-

ences are to 1970 & Supp. 1986]) regulates wholesale liquor pricing (J.S. App. 67A). It requires manufacturers and wholesalers to file monthly schedules containing their prices, per case and per bottle, for every item sold to retailers (*ibid.*).¹ The statute does not prescribe any particular wholesale prices; it simply requires that prices be posted monthly and adhered to during the following month (*id.* at 6A-7A).

ABC Law § 101-bb(2) governs retail liquor prices (J.S. App. 64A-65A). It prohibits retailers from selling any item at less than "cost," and defines "cost" as the wholesale "bottle price" listed in the wholesaler's monthly price schedule at the time the retail sale is made, plus a 12% mark-up (*ibid.*).² The statute does not require the bottle price listed in the wholesaler's schedule to bear any direct relation to the case price, at which retailers generally purchase (*id.* at 18A).³ Pursuant to statute,⁴ however, the State Liquor Authority (SLA) promulgated Rule 16.4(e), which provides a formula for computing a bottle price (N.Y. Admin. Code tit. IX, § 65.4(e)

¹ The schedule must be filed with the State Liquor Authority (SLA) by the fifth day of the month preceding the month in which the schedule is to take effect (ABC Law § 101-b(4); J.S. App. 68A). The SLA must make all schedules available for inspection by other wholesalers as well as the general public (*id.* at 68A-69A). Wholesalers have three days after inspection to amend their schedules to meet (but not beat) the prices of competing wholesalers (*id.* at 68A).

² The retailer's cost under Section 101-bb(2), therefore, does not necessarily reflect the wholesale price at which the retailer purchased the liquor.

³ In some cases retailers may be able to obtain a 2% volume discount (ABC Law § 101-b(2)(b); J.S. App. 67A).

⁴ See ABC Law § 101-b(4); J.S. App. 69A.

(1986); J.S. App. 70A). That formula requires the bottle price to bear a direct relation to the case price (*ibid.*).⁵

The posted "legal" price is a ceiling, or a maximum, price (J.S. App. 7A). Once a schedule of "legal" prices is filed, the statute prohibits a wholesaler from raising its prices above that posted legal price in succeeding months, except to reflect increases in its suppliers' prices, and requires reductions to reflect any reductions in a wholesaler's costs.⁶ Wholesalers need not always charge the legal price, however; they may reduce—or "post-off"—prices as a temporary "sale" (*ibid.*). "Post-off" prices must appear on the monthly price schedules and become the effective prices charged to all customers during that month. See J.S. App. 87A, 88A; see also *id.* at 7A.

When a wholesaler temporarily posts-off the case price of an item, it is not required to reduce the bottle price for that item as well. Under New York SLA Bulletin 471 (June 29, 1973) (J.S. App. 71A), a wholesaler offering a post-off price has the option of (1) not reducing the bottle price at all (in which case the "legal" bottle price remains the basis for the 12% mark-up), (2) reducing the bottle price to correspond to the reduced case price, or (3) reducing the bottle price by a lesser amount.⁷ Thus, Bulletin 471

⁵ For cases of 48 bottles or less, for example, the bottle price must be computed by adding \$1.92 to the case price and dividing by the number of bottles in the case (J.S. App. 70A).

⁶ ABC Law § 101-b(3)(b); J.S. App. 68A.

⁷ Rule 16.4(e) establishes a formula for computing "bottle prices" (see note 5, *supra*) and states that "[v]ariations will not be permitted without approval of the [State Liquor] [A]uthority." N.Y. Admin. Code tit. IX, § 65.4(e) (Supp. 1986); J.S. App. 70A. Rule 16.4 does not make any express allowance for "post-off" prices, but it allows the State Liquor Authority

permits wholesalers to determine whether and to what extent their post-off case prices to retailers may be reflected in reduced retail prices. See J.S. App. 5A.⁸

2. Appellant, a retail liquor store in New York, was found guilty by the SLA of violating ABC Law § 101-bb by selling liquor at a price lower than the statutorily defined cost (J.S. App. 4A). Appellant sought to annul the determination on the ground, inter alia, that Section 101-bb constitutes a resale price maintenance scheme inconsistent with the federal antitrust laws (J.S. App. 5A).⁹ The SLA

to approve variations in the Rule 16.4 formula. Thus, although Bulletin 471 appears to conflict with Rule 16.4 by authorizing bottle prices that have no direct relationship to the case price, it may be viewed as the requisite SLA "approval" for deviations from Rule 16.4. See R.71. This Court need not reconcile Rule 16.4 and Bulletin 471, in any event. The New York Court of Appeals did not discuss Rule 16.4 or its relationship to Bulletin 471. The court did conclude, however, that Bulletin 471 is consistent with the statute since Section 101-b(3) does not "mandate any price ratio between scheduled case and bottle prices" (J.S. App. 18A). This Court must accept that interpretation of the statute by the highest state court when ruling on the constitutional challenge presented here. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980).

⁸ The sample schedules in the record (J.S. App. 87A-88A) indicate that the bottle prices for some post-off items are reduced to the full extent permitted by the Rule 16.4 formula. For many other items, however, the wholesaler has posted a bottle price that does not reflect at all or reflects only part of the reduction in the case price.

⁹ Appellant also contended that the SLA exceeded its authority in promulgating Rule 16.4 and in issuing Bulletin 471 (J.S. App. 5A).

argued that the statutory scheme does not violate the Sherman Act because the minimum mark-up price provisions do not compel concerted anticompetitive activity. It further argued that the statute is immune from Sherman Act challenge under the "state action" doctrine (see *Parker v. Brown*, 317 U.S. 341 (1943)) and under the Twenty-first Amendment. J.S. App. 5A.

3. The New York Court of Appeals first focused on the SLA's claims that the statute is immune from Sherman Act challenge under *Parker v. Brown*, *supra*. The court rejected the asserted state action defense, finding that here, as in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), there was insufficient active state supervision of the resale price maintenance system for it to constitute "state action." J.S. App. 9A-10A. The court concluded, however, that the statute was shielded from antitrust challenge by the Twenty-first Amendment, because "the state interest in protecting retailers which underlies [the ABC Law] is of sufficient magnitude to override the federal policy expres[s]ed in the antitrust laws" (J.S. App. 17A). Finally, the court concluded that, in any event, the statute did not violate the Sherman Act because "the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with the federal statutes." *Ibid*. Judge Jasen filed a separate opinion, concurring in the majority's conclusions that the New York statute is consistent with the federal antitrust laws and that it is shielded by the Twenty-first Amendment, but disagreeing with the majority's holding that the statute does not qualify for the state action defense (J.S. App. 19A).

One judge dissented. Judge Kaye would have rejected the Twenty-first Amendment defense on the

ground that the state policies asserted in defense of the liquor regulation—promotion of temperance and maintenance of an orderly market for alcoholic beverages—lacked a substantial basis. J.S. App. 26A-27A. Judge Kaye also would have invalidated the statute as violative of the Sherman Act. He reasoned that “[e]ven if the pricing scheme could be upheld as furthering a State policy to protect small retailers against *unfair* competition, it goes well beyond, and by fixing minimum resale prices effectively and unnecessarily forecloses *all* competition.” *Id.* at 27A (emphasis in original).

DISCUSSION

The New York Court of Appeals was correct in relying on *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, supra*, to conclude that the state action defense does not bar application of the Sherman Act, 15 U.S.C. 1 *et seq.* The court’s conclusions that the statutory scheme is consistent with the Sherman Act and that the Twenty-first Amendment shields it from challenge are plainly incorrect under *Midcal*, however.

1. The “threshold question” is whether New York’s pricing plan for liquor is inconsistent with the Sherman Act (*Midcal*, 445 U.S. at 102). Although the court below did not address this issue at length, it cited as support for its holding with respect to the Twenty-first Amendment its conclusion that “the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with the federal [antitrust] statutes” (J.S. App. 17A). The court apparently based that conclusion on its belief that “stabilizing the retail mar-

ket and protecting the economic position of small liquor retailers” (*id.* at 15A) are procompetitive goals consistent with the federal antitrust laws. But protecting small retailers against large volume retailers does not necessarily serve the interests of consumers. As this Court has emphasized, the purpose of the antitrust laws is “‘the protection of *competition*, not *competitors*.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted; emphasis in original).

Moreover, the state court’s conclusion that New York’s “system of price maintenance” (J.S. App. 10A) is consistent with the Sherman Act misapprehends this Court’s *Midcal* holding. In *Midcal*, the Court ruled that a statutory system requiring wine producers and wholesalers to file fair trade contracts or schedules that establish binding resale prices “plainly constitutes resale price maintenance in violation of the Sherman Act.” 445 U.S. at 99, 103. New York’s retail liquor pricing scheme is not materially different from the system condemned in *Midcal*: New York wholesalers post prices that determine their customers’ minimum resale prices. As the responsible New York legislative committee explained when Section 101-bb(2) of New York’s ABC Law was amended in 1971, the amendment established a system of “resale price maintenance enforced by the State.” N.Y. Senate Excise Comm., *Final Report* 16-17 (1971) [hereinafter cited as *Final Report*].

Appellees characterize New York’s statutory scheme as a minimum percentage markup requirement, arguing that wholesalers merely set their own prices, which have “no impact on retail prices except as flow from the operation of the statutorily mandated minimum 12 percent mark-up on retail prices” (Mot. to

Dis. or Aff. 9). Thus, they contend the wholesalers do not engage in an illegal contract, combination or conspiracy (*id.* at 7-9).¹⁰ This contention ignores the discretion afforded wholesalers under the New York scheme.¹¹ Wholesalers may charge a "post-off" price lower than the "legal" case price and determine the extent to which that reduction in price will be reflected in the minimum retail price.¹² Whenever they choose to offer a post-off price lower than the legal price, wholesalers hold the power to determine whether the statutorily mandated 12% markup must be ap-

¹⁰ Appellees also attempt to distinguish the New York scheme from the California statute in *Midcal* on the ground that the California price posting scheme had a horizontal price effect. (Mot. to Dis. or Aff. 8-9). The Court in *Midcal* noted that the effect of the statute was to fix prices horizontally at the wholesale level because all wholesalers in a trading area were bound by a price schedule filed by one wholesaler. The Court found a Sherman Act violation based on the resale price maintenance portion of the statute alone, however, emphasizing that the wine producer dictated its customers' minimum resale prices. 445 U.S. at 102-103.

¹¹ Even if appellees' characterization of the scheme were accurate, there would still be resale price maintenance, because retailers would be precluded from setting their prices independently. The scheme might then constitute "state action" (see pages 9-12, *infra*).

¹² In addition, wholesalers that charge post-off prices can set their legal case prices purely with a view to their effect on retail prices. Wholesalers do not enjoy that freedom under pure minimum markup statutes, which allow the wholesaler to affect retail prices only by changing its own wholesale price. New York wholesalers have complete freedom in setting the legal case price on their first posting. Thereafter, they have the freedom to lower the legal price or to increase it to reflect increases in their own cost of obtaining liquor from the distiller.

plied to a bottle price reflecting the actual wholesale price or some greater amount. Thus, New York does not have a simple percentage markup statute, as appellees contend.¹³ Like the producers and wholesalers in *Midcal*, New York liquor wholesalers dictate the prices charged by retailers. See *Midcal*, 445 U.S. at 103. They do so at the command of the state, and not as a result of a private agreement between wholesaler and retailer, but that fact does not distinguish this case from *Midcal*, where the private parties acted under similar compulsion.¹⁴ Accordingly, the conclusion of the court below that New York's "minimum pricing" arrangement (J.S. App. 6A) is consistent with the federal antitrust laws is squarely in conflict with this Court's *Midcal* decision.

2. The Court of Appeals of New York properly concluded that the resale price maintenance scheme required by Section 101-bb does not constitute state

¹³ Compare *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), *aff'g Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981), on which appellees rely (see Mot. to Dis. or Aff. 8). *Morgan* involved a Connecticut liquor pricing statute that prescribed specific minimum markups, based on "actual costs" (or "bottle prices" that are statutorily defined to reflect actual costs, see 664 F.2d at 355; Conn. Gen. Stat. Ann. § 30-1(7) (West Supp. 1985)), at both the wholesale and retail levels. The statute did not authorize wholesalers to set resale prices; the state legislature itself performed this activity through specific statutory formulae.

¹⁴ The California statute permitted wine producers to set prices through a fair trade contract but required wholesalers to post a resale price schedule if the producer failed to do so (*Midcal*, 445 U.S. at 99). See also *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (*Midcal* involved a "statute [that facially] conflicted with the Sherman Act because it mandated resale price maintenance" (emphasis in original)).

action under *Parker v. Brown*, *supra*. In *Midcal* this Court enunciated two standards for antitrust immunity under the state action doctrine. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted).¹⁵ The Court concluded that the first test was satisfied because the California statute clearly indicated a purpose to permit resale price maintenance (*ibid.*). The second standard was not met, however, because "[t]he State simply authorizes pricesetting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules * * *. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* at 105-106 (footnote omitted).

The New York statute in this case is indistinguishable from the California statute for purposes of state action analysis. The New York statute meets the first *Midcal* test because it plainly evidences a legislative policy in favor of resale price maintenance. J.S. App. 10A. But the second test is not satisfied

¹⁵ In its most recent decisions the Court has reaffirmed the applicability of the *Midcal* standard to cases involving private conduct authorized or compelled by a state. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922 (Mar. 27, 1985), slip op. 8, the Court noted, "[t]he circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in [*Midcal*]." See also *Town of Hallie v. City of Eau Claire*, No. 82-1832 (Mar. 27, 1985), slip op. 4 n.3 (although *Midcal* involved an action against a state agency, it required the same analysis as cases involving state regulation of private anticompetitive acts).

for, as the state court observed, "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (*ibid.*).¹⁶ As we have noted (see pages 3-4, *supra*), the wholesaler has unsupervised discretion to determine whether the retailer's cost shall be computed on the basis of a "post-off" price at which the wholesaler actually sells to the retailer, the higher "legal" price, or a price in between, as well as unfettered discretion to set its legal price initially and to adjust it thereafter within certain limits. Thus, wholesalers can elect to guarantee retailers profit margins significantly in excess of 12%.¹⁷ When a state chooses to displace competition, it must replace it with adequate regulation. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.); *Town of Hallie v. City of Eau Claire*,

¹⁶ Appellees point to Judge Jasen's concurrence, which emphasized the SLA's issuance of Bulletin 471 and its ability to authorize wholesale price increases in special cases as indications that the SLA "monitor[s] market conditions" (Mot. to Dis. or Aff. 10; J.S. App. 24A-26A). The concurrence also relied on periodic legislative debates on liquor pricing to demonstrate a "pointed reexamination" of the state's policies (J.S. App. 24A). Even if these sporadic activities constituted "monitoring" or "pointed reexamination" of the resale price maintenance program in operation (rather than just of the state's policy), that alone would not suffice to immunize a statutory scheme that delegates to private parties the authority to make pricing decisions without supervision. See *Midcal* (445 U.S. at 105-106) noting that the state "neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts."

¹⁷ Indeed, wholesalers compete for sales to retailers by advertising guaranteed extra profit margins that may exceed 30% (J.S. App. 82A-86A, 100A-101A).

No. 82-1832 (Mar. 27, 1985), slip op. 4, 9. New York's decision to allow wholesalers broad, unsupervised discretion over retail prices removes this scheme from the realm of state action.¹⁸

3. The Court of Appeals of New York misapplied controlling precedent of this Court in concluding that New York's price-posting statute is shielded by the Twenty-first Amendment (J.S. App. 11A-17A).

a. Section 1 of the Twenty-first Amendment repealed prohibition; Section 2 gave the states power to regulate or prohibit entirely the importation and use of intoxicating liquor within their borders. Section 2 did not entirely repeal the Commerce Clause with respect to state liquor regulation; it simply created an exception to the normal operation of that clause by reserving to the states power to impose certain burdens on interstate commerce in intoxicating liquor. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330-332 (1963); *Capital Cities Cable, Inc. v. Crisp*, No. 82-1795 (June 18, 1984), slip op. 19-20. "Both the Twenty-first Amendment

¹⁸ Appellees' reliance (Mot. to Dis. or Aff. 9-10) on this Court's decision in *Hoover v. Ronwin*, No. 82-1474 (May 14, 1984), is misplaced. In that case the Court reaffirmed that when the anticompetitive conduct is that of the State itself, acting as sovereign, it is immune from Sherman Act challenge. *Ronwin*, slip op. 14 & n.24; *Parker v. Brown*, 317 U.S. at 350-351; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52-56 (1982). In *Ronwin*, as in *Bates v. State Bar*, 433 U.S. 350 (1977), an unsuccessful bar applicant challenged the denial of his admission as anticompetitive. This Court concluded that, since the Arizona Supreme Court itself made the ultimate decision whether to grant or deny bar admission to a candidate, the conduct at issue was the conduct of the State itself. *Ronwin*, slip op. 20 n.33; see also *Bates*, 433 U.S. at 359-361. *Ronwin* reemphasized, however, that the *Midcal* test governs private conduct undertaken pursuant to state authorization or discretion. *Ronwin*, slip op. 9, 20 n.33.

and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' " *Midcal*, 445 U.S. at 109 (quoting *Hostetter*, 377 U.S. at 332).

When state regulation of the liquor industry conflicts with federal law grounded in the commerce power, the question is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities*, slip op. 21; accord, *Bacchus Imports, Ltd. v. Dias*, No. 82-1565 (June 29, 1984), slip op. 11-12. The Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*Midcal*, 445 U.S. at 110). Although it grants the states "substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations" (*ibid.*).

Accordingly, in *Midcal*, the Court balanced the State's interest in maintaining resale prices of alcoholic beverages against the policies of the Sherman Act. It concluded that, in this context, California's interests in promoting temperance and protecting small retailers against predatory pricing by large retailers did not outweigh the substantial federal interest embodied in the antitrust laws. 445 U.S. at 110-114.¹⁹

¹⁹ Similarly, in *Capital Cities*, this Court held invalid an Oklahoma statute requiring cable broadcasters to delete liquor advertisements from out-of-state programs transmitted to Oklahoma subscribers. The Court acknowledged Okla-

b. As in *Midcal*, New York's interest in maintaining a system of resale price maintenance, an interest outside the core of the Twenty-first Amendment, must be balanced against the federal interest in the enforcement of the antitrust laws. The Court of Appeals of New York concluded that the state interest should prevail, relying on this Court's caveat in *Midcal* that "[w]e need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." 445 U.S. at 113-114. The court below emphasized that in *Midcal* this Court relied on the California courts' conclusion that the State's interest in protecting small retailers was not advanced by the resale price maintenance program. See 445 U.S. at 112-113. On the other hand, it believed, the history of New York's provision "demonstrates New York's commitment to protect its small retailers and the investigative determinations upon which the statutes intended to do so are premised." J.S. App. 15A.²⁰

homa's legitimate interest in promoting temperance and accepted its judgment that restrictions on liquor advertising promoted that interest, but concluded that the State's interest was less substantial than the federal interest in the availability of cable services (slip op. 22-23). Thus, the Court held that "when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the state's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause." Slip op. 23 (footnote omitted).

²⁰ In recommending the 12% mark-up amendment to Section 101-bb in 1971, the Senate Excise Committee identified a central purpose of the legislation as "the promotion of temper-

The court below, however, did not make any finding that Section 101-bb effectively serves the purpose of protecting either small retailers or consumers.²¹

ance" (*Final Report* 18, 35; ABC Law § 101-bb(1)). The court below did not explicitly rely on that state interest in this case. Addressing the interest in consumer pricing, however, the court noted (J.S. App. 16A n.2) that when Section 101-bb was first enacted in 1964 as a simple prohibition of below-cost pricing, the Moreland Commission had concluded that the assumed correlation between high liquor prices and temperance did not exist. But in 1971, when Section 101-bb was amended, the Senate Excise Committee did voice concern that per capita consumption of liquor had increased substantially since 1964, as liquor prices had decreased. The Committee did not conclude that low prices necessarily led to increased consumption, but it did conclude that "even if [state policies] do not serve to arrest the rising tide of consumption of alcohol, at least [they should] make no contribution thereto," and that "an all out emphasis on low liquor prices" would not "assist in influencing drinking habits." *Final Report* 15. The committee's report did not suggest that a resale price maintenance scheme would promote temperance, however. Rather, as the court below implicitly found, it was retailer protection alone that prompted the legislation, particularly the 12% markup amendment in 1971. *Final Report* 30, 37.

²¹ The court concluded generally that if consumers are "to be protected from inflated prices and to enjoy the benefits to be derived from market competition, then the regulatory provisions in section 101-bb and related sections best serve that purpose" (J.S. App. 15A-16A (emphasis added; footnote omitted)). The "consumer protection" goal of eliminating the price discrimination suffered by New York residents emphasized by the appellate court is not served by the price-posting section, however, but by ABC Law § 101-b(3) (d), requiring the manufacturer to affirm that its wholesale prices are no higher than those it charges in other states (J.S. App. 6A). Neither that section nor other "related" sections of New York's ABC Law are at issue in this case. Cf. *Brown-Forman Distillers Corp. v. New York Liquor Authority*, prob. juris. noted, No. 84-2030 (Oct. 7, 1985).

Nor would the history upon which it relied justify such a conclusion. The court cited the state Senate Excise Committee Report, which found that between 1964 and 1971 (when the statute simply prohibited sales "below cost") the number of retail stores declined. That same report also noted, however, that during that period many "small retailers" gained substantially in sales volume and market share to become "large retailers." Final Report 3, 12-13. And although the Excise Committee concluded that action was required to preserve small retailers, the court below cited nothing in the report to indicate that the current system would be likely to accomplish that purpose. In light of the evidence cited by the California Supreme Court and this Court in *Midcal* concerning the adverse correlation between the growth of small retail stores and "fair trade" laws,²² it cannot lightly be assumed that a system of resale price maintenance would have such an effect.

The court below viewed the New York system of retail price controls as a remedy for predatory pricing by a few large volume outlets that threatened to drive small retailers out of business, consolidate control of the market, and then "dictate" prices, to the ultimate injury of consumers (J.S. App. 15A). This statutory scheme goes far beyond anything reasonably necessary to eliminate predatory pricing, however. Section 101-bb on its face prohibits a retailer from pricing "below cost," but the statute defines

²² *Midcal* (445 U.S. at 113, citing S. Rep. 94-466, 94th Cong. 1st Sess. 3 (1975)), which indicated that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws."

"cost" in an artificial manner. It bases the retailer's "cost" on a bottle price that may have no relation to the case price that the retailer actually pays: the wholesaler need not reduce the "legal" bottle price to reflect a "post-off" case price, and the resale price must be based on the wholesale price at the time of the retail sale—a price which does not necessarily reflect the cost of the actual purchase from the wholesaler. See pages 2-4, *supra*. Thus, the scheme goes far beyond the prohibition of actual below cost pricing, and precludes competitive nonpredatory pricing as well. The relation of this statute to the State's asserted purpose of protecting small retailers from predation is at best tenuous. Such an unsubstantial state interest cannot "prevail against the undoubted federal interest is a competitive economy." *Midcal*, 445 U.S. at 114.

CONCLUSION

Probable jurisdiction should be noted. Because the decision of the court below is manifestly inconsistent with *Midcal*, the Court may wish to consider summary reversal.

Respectfully submitted.

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FEBRUARY 1986

JOINT APPENDIX

EDITOR'S NOTE

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No. 84-2022

Supreme Court, U.S.

FILED

MAY 8 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term 1985

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

v.

THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN AND FREDERICK PANNOZZO,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JOINT APPENDIX

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**JURISDICTIONAL STATEMENT FILED JUNE 28, 1985
PROBABLE JURISDICTION NOTED MARCH 24, 1986**

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APPENDIX A**Relevant Docket Entries and Important Dates**

Chronological List of Important Dates
in the Proceedings Before the New York State
Liquor Authority (the "SLA") and in the Courts

<i>Date:</i>	<i>Event:</i>
06/24/81	Occurrence of sales by appellant of two bottles of liquor, giving rise to this proceeding
06/26/81	Notice of Pleading and Hearing Before the SLA
07/06/81	Licensee's Not Guilty Plea and Request for a Bill of Particulars
08/03/81	SLA's Bill of Particulars
01/20/82	License Suspension Hearing Before SLA Deputy Commissioner
07/16/82	Hearing Officer's Report finding that Appellant advertised and/or sold liquor at a price less than cost on June 24, 1981
11/12/82	Order of Suspension reflecting SLA determination of October 27, 1982 that Appellant advertised and/or sold liquor at a price less than cost on June 24, 1981
12/27/82	Notice of Petition, Verified Petition and Supporting Affidavit (of Seymour Howard, Esq.), filed with Supreme Court of the State of New York, County of New York, seeking to annul and reverse the SLA's Order of Suspension
03/10/83	SLA's Verified Answer and Supporting Affidavit (of Robert S. Hammer, Esq.) filed with Supreme Court of the State of New York, County of New York

07/01/83 Entry of the June 23, 1983 Order and Memorandum of the Supreme Court of the State of New York, County of New York (Special Term, Part I), denying Appellant's Verified Petition to annul SLA Order of Suspension

08/01/83 Notice of Appeal to Appellate Division of the Supreme Court of the State of New York for the First Judicial Department ("Appellate Division, First Department") filed by Appellant with Supreme Court, County of New York

07/12/84 Order of Appellate Division, First Department, reversing and vacating the judgment of the Supreme Court, New York County

07/23/84 Notice of Appeal to the Court of Appeals of the State of New York filed by SLA with Appellate Division, First Department

04/02/85 Order of New York Court of Appeals reversing Order of Appellate Division, First Department and reinstating judgment of Supreme Court, County of New York

05/24/85 Notice of Appeal to Supreme Court of the United States filed by Appellant with the Supreme Court, County of New York (the court possessed of the record)

05/25/85 Notice of Appeal to Supreme Court of the United States filed by Appellant with the New York Court of Appeals (the court from whose judgment this appeal is taken)

06/28/85 Jurisdictional Statement filed

10/07/85 Order of the Supreme Court of the United States inviting the Solicitor General to file a brief stating the views of the United States herein

02/21/86 Brief filed by Solicitor General of the United States supporting the position of appellant herein

03/24/86 Order of the Supreme Court of the United States noting probable jurisdiction

APPENDIX B**Verified Petition****SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

In the Matter of the Application of
324 LIQUOR CORP., d/b/a

YORKSHIRE WINE & SPIRITS

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law and Rules,

—against—

EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT DOYLE,
TERRENCE R. FLYNN and FREDERICK PANNOZZO,

Respondents.

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF
NEW YORK:

Petitioner, by its attorney, SEYMOUR HOWARD,
for its Petition herein, alleges:

FIRST: Petitioner is a domestic corporation and maintains its principal place of business at 324 East 86th Street, New York, New York.

SECOND: At all times hereinafter mentioned, Petitioner was and still is licensed under the laws of the State of New York to sell liquors and wines at retail for off-premises consumption at premises known as 324 East 86th Street, New York, New York.

THIRD: The Respondents, EDWARD J. McLAUGHLIN, HUGH B. MARIUS, ROBERT DOYLE,

TERRENCE R. FLYNN and FREDERICK PANNOZZO are Commisisoners of the New York State Liquor Authority (hereinafter referred to as the "AUTHORITY") appointed by the Governor of the State of New York, which AUTHORITY was created and exists under and pursuant to appropriate provisions of the Alcoholic Beverage Control Law (hereinafter referred to as the "ABC LAW") of the State of New York.

FOURTH: In June 1981, the AUTHORITY served a "Notice of Pleading and Hearing" dated June 26, 1981 on the Petitioner charging that the Petitioner had violated Section 101-bb of the ABC LAW in that "it advertised and/or sold liquor at a price less than cost on June 24, 1981." A copy of that notice is annexed hereto as Exhibit "1".

FIFTH: On July 6, 1981, Petitioner, by its attorney, in writing pleaded "NOT GUILTY" to the charge alleged and requested particulars as to the said charge. A copy of the letter is annexed hereto as Exhibit "2".

SIXTH: By letter dated August 3, 1981 counsel for the AUTHORITY served its Bill of Particulars upon Petitioner's attorney. A copy of that Bill of Particulars is annexed hereto as Exhibit "3".

SEVENTH: A hearing was held on January 20, 1982 at which Petitioner stipulated that the advertisement annexed to the Bill of Particulars was placed by Petitioner, and that investigators employed by the AUTHORITY had purchased at Petitioner's store on June 24, 1981 a 1.75 liter bottle of Chatham Gin, 92 proof, for

\$9.54 plus sales tax, and a 1.75 liter bottle of Smirnoff Vodka, 80 proof, for \$11.59 plus sales tax.

EIGHTH: The AUTHORITY placed in evidence the schedules of prices to retailers filed by Peerless Importers Inc. and by Star Industries Inc. (Petitioner's suppliers of the two (2) brands of liquors) for the month of June 1981; copies of which were annexed as part of the AUTHORITY's Bill of Particulars, annexed hereto as Exhibit "3".

NINTH: On October 27, 1982, the AUTHORITY found Petitioner guilty of the violation charged and ordered that Petitioner's license be suspended for ten (10) days together with a bond forfeiture in the amount of ONE THOUSAND (\$1,000.00) DOLLARS. A copy of the order dated November 12, 1982 is annexed hereto as Exhibit "4".

TENTH: Petitioner claims that the price schedules filed by its suppliers and which were the basis of the Authority's determination and order were illegal in that:

(a) The "bottle prices" set forth therein included an amount of \$.32 per bottle which the suppliers were compelled to charge by rule or directive of the Authority which the Authority has no power to mandate, and

(b) That the Petitioner's suppliers relying on a "bulletin" of the Authority, No. 471, issued June 29, 1973 had "posted-off" the case price of the two brands of liquor involved in the matter and had failed to fully "post-off" the "bottle price"; that Bulletin No. 471 is illegal and invalid and permits wholesalers to circumvent the express provisions of Section 101-b of the Alcoholic Beverage Control Law; the action of the Authority in issuing said Bulletin and permitting

the practices described therein was and is beyond the powers delegated to the Authority and inconsistent with Section 101-b of the Alcoholic Beverage Control Law.

(c) That the statutory scheme requiring wholesalers to file minimum price schedules for its products and prohibiting off premises retail licenses from selling below the "bottle price" contained in the schedule filed by their supplier for the month in which a sale takes place plus 12% of that "bottle price" constitutes price fixing by a private party and violates the provisions of The Sherman Anti Trust Act.

ELEVENTH: The pricing mechanism resulting in the fixing of the minimum retail price of a brand of liquor below which a retail licensee for off-premises consumption is prohibited from selling a brand is contained in Sections 101-b and 101-bb of the Alcoholic Beverage Control Law, which sections provide in part,

"Section 101-b. Unlawful discriminations prohibited; filing of schedules; . . .

. . .2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of *two per centum* for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, Such schedule shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers. Where any schedule filed after the effective date hereof pursuant to paragraphs (a) of this subdivi-

vision with respect to any brand of liquor reflects a reduction or increase in the bottle or case price of any item set forth therein from the bottle or case price of such item theretofore in effect for the previous month, for the period during which the bottle and case price of any item set forth therein shall remain in effect, any schedule of price to retailers filed by a wholesaler pursuant to this paragraph with respect to such item of liquor shall reflect, in the event of a decrease, a like reduction in percentum in the bottle or case price of such item set forth herein, and in the event of an increase, not more than a like increase in percentum in the bottle or case price of such item set forth therein. . ."

"4. Each such schedule required by paragraph (a) of subdivision three of this section shall be filed on or before the twenty-fifth day of each month . . . Each such schedule required by paragraph (b) of subdivision three of this section shall be filed on or before the fifth day of each month, and the prices and discounts set forth therein shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for such calendar month. Within ten days after the filing of each schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. . ."

"Section 101-bb. Prohibition against retail sales at less than cost.

... 2. No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

(a) "liquor" shall mean liquor bearing a brand or trade name, and of like age and quality, which has been duly registered with and approved by the liquor authority pursuant to section 107A of this chapter, and

(b) "costs shall mean the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor. As used in this paragraph (b) the term "price" shall mean the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred one-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquors;..."

TWELFTH: Rule 16 promulgated by the Authority provides in part,

"... 4(e) For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. . ."

THIRTEENTH: On June 29, 1973, the Authority issued Bulletin 471 which advises wholesalers that "... there developed a situation during post-off period

which resul(t)ed in what became known as a "two bottle" price. The Authority has recognized this as undesirable, if not illegal. . .". That Bulletin further advised wholesalers that the *case* price of a brand of liquor may be posted off (legal price decreased) for any month and that the wholesaler is given the choice to (a) elect not to reduce the bottle price, in which case the legal bottle price will be the base for the 12% retail mark-up provided in Section 101-bb(2) of the Alcoholic Beverage Control Law or, (b) elect to reduce the bottle price to conform with the reduced case price, "consistent" with Rule 16.4(e), in which case the reduced bottle price will be the base for the 12% mark-up or, (c) adopt a bottle price anywhere between the extremes "authorized" in (a) or (b) above, in which case the reduced bottle price will be the base for the 12% mark-up. Further, the Bulletin states that with regard to the choices which do reduce the bottle price a wholesaler may "restrict deliveries to at least a case of mixed items" and that "... no control is placed on the number of consecutive months during which post-offs may be scheduled." A copy of Bulletin 471 is annexed hereto as Exhibit "5".

FOURTEENTH: In promulgating Rule 16 which mandates that the "bottle price" must exceed the "case price" by \$1.92 divided by the number of containers in the case the Authority has exceeded the powers granted it under Section 17 of The Alcoholic Beverage Control Law and any other section contained therein, in that the Authority has no power to compel wholesalers to add any amount to their prices.

FIFTEENTH: In issuing Bulletin 471 and by permitting wholesalers to "post-off" or reduce the legal case

price in any month without fully passing through the full post-off to the "bottle price" the Authority has exceeded the powers granted it under Section 17 of the Alcoholic Beverage Control Law of New York State and any other section contained therein, in that the Authority is permitting wholesalers to offer quantity discounts in excess of those permitted by statute, to wit Section 101-b of the Alcoholic Beverage Control Law, and permitting wholesalers to fix the legal minimum retail price of a brand of liquor in excess of that intended by statute.

SIXTEENTH: That the statutory scheme as contained in Sections 101-b and 101-bb of the Alcoholic Beverage Control Law which in effect requires wholesalers to establish minimum retail prices for brands of liquor and eliminates price competition among retailers and is invalid as a violation of the Sherman Anti-Trust Act of the United States and in violation of the United States Constitution.

WHEREFORE, Petitioner prays for an order annulling the determinations of the Respondent, as contained in its order dated November 12, 1982, and for such other and further relief as to the court may seem just and proper.

DATED: Jericho, New York Yours, etc.,
December 27, 1982

SEYMOUR HOWARD
Attorney for Petitioner
Office & P.O. Address
380 North Broadway
Jericho, New York 11753
(516) 822-7770

(Reproduced on the following pages are Exhibits 2 and 3 annexed to the Verified Petition. Exhibits 1, 4 and 5 also annexed to the Verified Petition are not reproduced herein.)

EXHIBIT "2"—LETTER DATED JULY 6, 1981
("NOT GUILTY" PLEAD AND DEMAND FOR
BILL OF PARTICULARS)

July 6, 1981.

State Liquor Authority
250 Broadway
New York, New York 10007

Attention: Warren B. Pesetsky, Counsel

Re: 324 Liquor Corp.
Yorkshire Wine & Spirits
Serial No. New York L 4967
Premises: 324 East 86th Street,
New York, New York 10028

Dear Mr. Pesetsky:

I have been retained to represent the above-named licensee with regard to the charge set forth in a notice of pleading and hearing dated June 26, 1981.

The licensee pleads "Not Guilty" to the charge set forth in that notice.

I would appreciate the following particulars regarding the alleged violation:

(1) What is the specific charge against the licensee; specify as to whether the licensee advertised liquor at a price less than cost on June 24, 1981, or sold liquor at a price less than cost on June 24, 1981.

(2) If the charge is that the licensee advertised in violation of Section 101-bb, set forth a copy of said advertisement(s).

(3) If the alleged violation is that the licensee sold liquor at a price less than cost, set forth the following:

(a) Name the brand and size of container allegedly sold by licensee;

(b) What price was charged by the licensee;

(c) Set forth who allegedly purchased said liquor;

(d) From whom was it purchased;

(e) What time of day did the transaction occur;

(f) Set forth the minimum resale price of such product as claimed by the Authority;

(g) Set forth a copy of the schedule of the licensee's supplier filed for the month of June 1981, which contains the brand allegedly sold in violation of Section 101-bb.

(h) If the Authority will claim that an employee or agent of the Authority made a purchase, set forth the name of such employee or agent.

Very truly yours,
SEYMOUR HOWARD

SH:dd

EXHIBIT "3"—RESPONDENTS' BILL OF PARTICULARS

Executive Department
Division of Alcoholic Beverage Control
250 Broadway, New York, N.Y. 10007

August 3, 1981

Seymour S. Howard, Esq.
380 North Broadway
Jericho, New York 11758

Re: 324 Liquor Corp.
Yorkshire Wine & Spirits
324 E. 86th St.
New York, New York 10028
Serial No. NY L 4967

Dear Sir:

The following is the Authority's Bill of Particulars pursuant to your demand:

1. Both
2. Copy of advertisement enclosed.
3. 1.75 liter of 92 proof Chatham Gin was advertised at \$9.54 and was sold on 6/24/81 at about 2:00 P.M. by an unidentified female employee to SLA Investigator Levine for \$9.54 plus sales tax. The minimum resale price was then \$10.27 plus sales tax.
1.75 liter of 80 proof Smirnoff Vodka was advertised at \$11.59 and was sold on 6/24/81 at about 2 P.M. by an unidentified female employee to SLA Investigator Delgado for \$11.59 plus sales tax. The minimum resale price was then \$12.51 plus sales tax.

Copies of the schedules of the licensee's supplier for the month of June 1981 are enclosed.

Very truly yours,
/s/ Warren B. Pesetsky
Counsel to the Authority

SCHEDULE OF LIQUOR PRICES TO RETAILERS

BRAND LABEL REQ'D TYPE OF BEV. & BRAND NAME	SIZE	AGE OR W. MEUT. SPELIT	PROOF	LEGAL PRICE		POST OFF PRICE		# OF BTL PER CASE	DISCOUNT FOR QUANTITY	MINIMUM BOTTLE RETAIL
				PER BOTTLE	PER CASE	PER BOTTLE	PER CASE			
DOMESTIC GIN #6523-2296 -67 COITHS HIGH & DRY ERTIFIED ON QTS PT	100	90		11.83	69.07	11.01	64.15	6	A	12.33
	1.75 L			7.06	82.74	6.33	74.04	12	A	7.09
	1 L			6.19	72.37	5.59	65.14	12	A	6.26
	QTS			5.35	62.32	4.86	56.36	12	A	5.44
	750 ML			3.58	83.95	3.29	77.13	24	A	3.68
	500 ML			3.04	71.12	2.71	63.22	24	A	3.04
#6523-2281 -01 URTONS GIN	200 ML			1.57	73.44	1.47	68.44	48	A	1.6
	1.75 L	90		9.85	57.17	9.18	53.16	6	A	10.28
	1 L			6.00	70.09	5.18	60.29	12	A	5.80
	QTS	80		4.99	57.96	3.66	42.00	12		4.10
	1.75 L	92		14.59	85.59	8.62	47.77	6	A	9.62
	1 L			8.61	101.40	5.18	58.24	12	A	5.80
#6523-2291 -41 CHATHAM DISTILLED LONDON DRY GIN	750 ML			6.59	77.15	3.88	44.67	12	A	4.35
	500 ML			4.54	107.06	2.59	60.18	24	A	2.90
	200 ML			1.93	90.85	1.13	52.15	48	A	1.21
	1.75 L	94		14.59	85.59	8.62	47.77	6	A	9.62
	1 L			8.61	101.40	5.18	58.24	12	A	5.80
	QTS			8.16	96.01	5.18	60.24	12	A	5.80
#6523-2119 -41 CHATHAM GIN	5 THS			6.64	77.75	3.88	44.67	12	A	4.35
	750 ML			6.59	77.15	3.88	44.67	12	A	4.35
	500 ML			4.54	107.06	2.59	60.18	24	A	2.90
	PT5			4.30	101.35	2.59	60.18	24	A	2.90
	200 ML			1.93	90.85	1.13	52.15	48	A	1.2
	1.75 L	80		10.12	58.80	9.98	52.95	6	A	11.1
#6523-2199 -20 LEISCHMANN'S GIN	1 L			5.86	68.39	5.77	62.36	12	A	6.4
	QTS			5.69	66.35	5.31	61.80	12	A	5.9
	750 ML			4.57	52.95	4.57	47.95	12	A	5.1
	500 ML			3.09	72.22	3.09	67.22	24	A	3.4
	PT5			2.91	67.90			24	A	3.2
	200 ML			1.36	63.35	1.36	58.35	48	A	1.5
#6523-2124 -32 LENMORE DISTILLED RY GIN	1.75 L	1003	80	9.01	52.15			6		10.0

BRANDS IMPORTERS INC.
Produce of America

BROOKLYN, NEW YORK 11222
City, Town or Village

ALL PRICES must always be shown and to the EFFECTIVE PRICE column
show a FULL OFF PRICE in blue column

ANALYST'S NOTE: PRICE must be shown. It represents the legal bottle
and a few per cent. bottle price is shown in green all other monthly plus 12%
should be marked with

SCHEDULE OF LIQUOR PRICES TO RETAILERS

EFFECTIVE MONTH OF JUNE

19 81

CONTINUED LIQUOR PRICES TO RETAILERS

[illegible]

RYAN INDUSTRIES, INC.

LEGAL PAPER AND SUPPLIES AT WHOLESALE AND RETAIL EFFECTIVE PRICE

THESE BOOKS BELONG TO THE
PROPERTY OF THE
LIBRARY OF THE
UNIVERSITY OF
TORONTO
1961

Swampy New York 11791

Schedule of Liquor Prices to Retailers

Effective Month of JUNE 1981

Page No. 44

Off the Bottle WINES AND SPIRITS WINE & LIQUOR DISCOUNT SUPERMARKET

GILBEY'S
LONDON DRY GIN
1.75 Liter

1159
CASE 69 50

• 1.75 Liter Yorkshire Gin \$4.99
 • 1.75 Liter Chatham Gin 82° \$5.49
 • 1.75 Liter Gordons Gin \$11.99
 • 1.75 Liter Tuller Gin \$8.99
 • 1.75 Liter Beefeater Gin \$15.99
 • 1.75 Liter Tappanary Gin \$15.99

SMIRNOFF
VODKA
80 Proof
1.75 Liter

1159
CASE 69 57

• 1.75 Liter Yorkshire Vodka \$4.99
 • 1.75 Liter Wolfshmidt's \$10.99
 • 1.75 Liter Gordons Vodka \$10.99
 • 1.75 Liter Tuller Vodka \$8.99
 • Full Quart Spangherry 83 \$10.99
 • Full Liter Wolfy Pral \$3.99
 Dry Vermouth

ALMADEN
CHABLIS
3 LITER

163
CASE 19 52

• 3 Liter Opus Chablis \$4.99
 • 3 Liter Paul Masson Chablis \$7.99
 Rose
 • 3 Liter Sebastien Mt. Chablis \$4.99
 • 4 Liter Inglenook Navelle Chablis Rose \$4.99
 • 4 Liter Green Red White \$4.99
 • 4 Liter Ch. Fattissimo Red \$4.99

JOS. DROUHIN
CHABLIS '78

809
CASE 19 50

BLUE NUN
LIEBFRAUMILCH

575
CASE 34 48

RIUNITE
LAMBRUSCO

195
CASE 23 29

KELLER-GEISTER
Light Brandy White

169
CASE 19 49

B & G
BLANC DE BLANC

249
CASE 28 19

GALLO
PORT
SHERRIES

489
CASE 19 49

ERNEST & JULIO GALLO
• Chateau
• Rose
• French Cabernet
• French Cabernet

319
CASE 19 79

GALLO
HEARTY BURGUNDY
PINK CHABLIS

499
CASE 19 99

CARLO ROSSI
• Chablis
• Chablis

249
CASE 16 49

GALLO
• CHABLIS BLANC

550
CASE 22 49

JOHNNIE WALKER
RED LABEL SCOTCH

1999
CASE 119 94

• 1.75 Liter Yorkshire Scotch \$11.99
 • 1.75 Liter Inner House \$12.19
 • 1.75 Liter J & B Scotch \$18.99
 • 1.75 Liter Tuller Scotch \$18.99
 • 1.75 Liter Green's Scotch \$21.99
 • Full Liter Martell & Rossi
 Sweet Vermouth \$4.99

BARBELLA
SOAVE

249
CASE 28 50

• 1.5 Liter Folloni Soave \$3.99
 • 750 ML. Botla Soave \$3.19
 • Valpolicella \$3.19
 • 750 ML. Fazi Battaglia \$3.19
 • 750 ML. Folloni Canella \$2.49
 • 750 ML. Cavit Pinot Grigio \$2.49
 • 750 ML. Cavit Pinot Grigio \$2.49
 • 750 ML. Cavit Pinot Grigio \$2.49

BLACK FOREST
GIRL QBA

249
CASE 28 50

• 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49
 • 750 ML. Michel Schneider \$2.49

BACARDI
RUM

689
CASE 19 50

SEAGRAMS
VO

1678
CASE 19 50

JIM BEAM
BOURBON

1216
CASE 19 50

CHRISTIAN BROS.
BRANDY

855
CASE 19 50

CHATEAU BOTTLED
1978 WINES

• 1978 Chateau Gloria \$4.99
 • 1978 Chateau Laffite \$4.99
 • 1978 Chateau Laffite \$4.99
 • 1978 Chateau Laffite \$4.99
 • 1978 Chateau Laffite \$4.99
 • 1978 Chateau Laffite \$4.99
 • 1978 Chateau Laffite \$4.99

CALIFORNIA
CABERNET SAUVIGNON

• 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99
 • 1978 Keenan Napa Valley \$11.99

CALIFORNIA
CHARDONNAY

• 1978 Callaway Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99
 • 1978 Janel Vineyards \$4.99

Prices effective 'til June 30. In case of typographical error, lowest price permitted by law will prevail. All items subject to inventory depletion. We reserve the right to limit quantities per person.

Off the Bottle WINE & LIQUOR DISCOUNT SUPERMARKET 324 EAST 86th ST. N.Y. WINE & SPIRITS (Between 1st & 2nd Aves) 249-2300

APPENDIX C

Affidavit—Seymour Howard in Support
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

324 LIQUOR CORP., d/b/a
 YORKSHIRE WINE & SPIRITS,

Petitioner,

For a Review Pursuant to Article 78
 of the Civil Practice Law and Rules,

-against-

EDWARD J. MCLAUGHLIN, HUGH B. MARIUS,
 ROBERT DOYLE, TERRENCE R. FLYNN and
 FREDERICK PANNOZZO,

Respondents.

AFFIDAVIT

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

SEYMOUR HOWARD, being duly sworn, says:

I am the attorney for the Petitioner herein and make this affidavit in support of Petitioner's application for an Order to annul and set aside the determination and Order of the State Liquor Authority dated November 12, 1982.

1. The determination and Order referred to above found Petitioner guilty of violating section 101-bb of the Alcoholic Beverage Control Law of New York State (hereinafter referred to as the "ABC Law") in that it adver-

tised and sold two (2) brands of liquor below the legal minimum retail price, and fixed as a penalty a ten day suspension and ONE THOUSAND (\$1,000) DOLLAR fine.

2. The two brands of liquor involved in the sale were CHATHAM, 90 proof, GIN (1.75 liter bottle) and SMIRNOFF VODKA, 80 proof (1.75 liter bottle). Petitioner's suppliers (wholesalers) of these brands were PEERLESS IMPORTERS, INC. and STAR INDUSTRIES INC., respectively. It should be noted here that PEERLESS IMPORTERS, INC. is the only wholesaler selling CHATHAM GIN to retailers in the New York Metropolitan area. In the New York Metropolitan Area, three (3) wholesale houses, namely, STAR INDUSTRIES, CHARMER INDUSTRIES and PEERLESS IMPORTERS INC. sell SMIRNOFF VODKA to retailers.

3. Petitioner raised the following three (3) defenses at the hearing:

(a) That the minimum retail pricing system as set forth in sections 101-b and 101-bb of the ABC Law provides for the fixing of minimum retail prices of brands of liquor by a private party with no supervision or review by the State, and violates the provisions of the Sherman Anti-trust Act of the United States.

(b) That the Liquor Authority exceeded its powers in adopting a rule which compels all wholesalers to add \$1.92 divided by the number of bottles in a case of liquor when fixing the "bottle price" of a brand of liquor (Rule 16).

(c) That the Liquor Authority exceeded its powers in issuing Bulletin 471 which permits wholesalers to

elect not to pass through a "post-off" or sale price on a case of liquor to the "bottle price", which procedure is directly contrary to the maximum discount provisions for quantity purchases provided in Section 101-b of the ABC Law, and permits wholesalers to fix a minimum retail price for a brand of liquor in excess of that intended by our legislature.

4. The Petition sets forth the sections of the ABC Law and rules of the Authority involved. It is the purpose of this affidavit to treat the defenses separately and set forth the mechanics of the statutory price fixing scheme and how they relate to each defense.

5. Substantially, the pricing mechanism for the three (3) levels in the liquor industry in this state is as follows:

(a) Manufacturers and distillers file monthly schedules with the Liquor Authority which set forth their prices to wholesalers. With these schedules each is required to file an affirmation confirming that the prices charged are no higher than the lowest prices charged wholesalers in any other state (Section 101-b(3) (a) and (3) (d)).

(b) Wholesalers. When a wholesaler first obtains a brand to be carried and sold, he alone sets and files his "legal price" to retailers for that brand. No statute governs or controls that initial "legal price" fixed by a wholesaler and it can be as high or as low as the wholesaler desires without any standard or prohibitions or any review or approval by the State or Liquor Authority. Thereafter each month the wholesaler files schedules with the Liquor Authority which set forth that wholesaler's "case" and "bottle price" to retailers for all brands marketed by that wholesaler.

In any month after the initial filing a wholesaler may lower his "legal price" to retailers (commonly known as a "post-off") without approval or review of the Liquor Authority, and may sell at his cost or even below cost.

In another case, *MANCINI v. STATE LIQUOR AUTHORITY*, 54 N Y 2d 860 (Remittitur amd. 54 N Y 2d 863), counsel to the Liquor Authority, in an answering brief, stated at one point, (p.18):

"Finally, appellant Mancini is correct in his assertion that there is no mandate that an increase in price to a wholesaler carries a required increase in price to retailers. He is further correct that a wholesaler is free to file "post-offs" or decreased prices at any time without the consent of the State Liquor Authority and can sell at cost or even below cost if the wholesaler so desires. . . ."

On or about June 29, 1973, the Liquor Authority issued a directive Bulletin 471 which permits a wholesaler when filing a "post-off" on the case price of a brand to elect between three (3) alternatives effecting the "bottle price",

- (i) the wholesaler may pass the post-off through to the "bottle price" decreasing the "bottle price" proportionately with the "case price", or
- (ii) the wholesaler may "post-off" the "case price" without decreasing the "bottle price", or
- (iii) the wholesaler may fix the "bottle price" somewhere in the middle at its own discretion.

A copy of that Bulletin is annexed to the Petition as Exhibit "5".

The only restriction on a wholesaler's price to retailers is that the Liquor Authority's consent must be ob-

tained if the wholesaler wants to increase his price above the "legal price" for a brand of liquor.

Simply stated, the wholesaler, other than raising his price above the filed "legal price" to retailers, is free to price a brand at his own discretion without any control or supervision of the State or the State Liquor Authority.

It should be further noted that Section 101-b(4) provides that wholesalers' schedules of prices to retailers must be filed by the fifth day of the month to take effect on the first day of the following month. The schedules filed by all wholesalers are made available for inspection by other wholesalers who then have three (3) days to amend their schedule to meet a lower price for a brand of liquor.

(c) Retailers. The "bottle price" fixed by a wholesaler in his schedule for the month plus TWELVE (12%) percent of that price is the minimum retail price for that brand in that month below which a retailer purchasing from that wholesaler is prohibited from selling or advertising a brand.

Other than the statutory mandated TWELVE (12%) percent mark-up on the wholesalers "bottle price" in any month (Section 101-bb(2) of the ABC Law) the State neither reviews, participates in, supervises or controls the price fixed by the wholesaler for a brand of liquor, and the wholesaler knowing of the TWELVE (12%) percent mandated mark-up is free to fix the minimum retail price for a brand of liquor in each and every month of the year.

As specific examples of this there is annexed hereto as Exhibit "A" copies of advertisements by various

wholesalers published in the Licensed Beverage Journal, December 17-22, 1982 issue showing that these wholesalers have themselves fixed minimum retail bottle prices of various brands, not with the TWELVE (12%) percent minimum mark-up mandated by the legislature, but with minimum legal mark-ups based on the wholesalers unilaterally fixed "bottle prices" of 20% for E & J Brandy; 26.7% for a litre of CUTTY SARK Scotch; or 28.5% for a 750 ML of CUTTY SARK Scotch; 22.9% for a 1.75 litre bottle of FINLANDIA Vodka; 30% for a litre of FINLANDIA Vodka. One wholesaler, Knickerbocker Liquor Corp., advertises a program offering a legal minimum of 30% mark-up on a full line of spirits including nationally advertised brands of Scotch, Vodka, Cognac, etc.

These are glaring examples that the minimum retail prices of brands of liquor *are fixed* by wholesalers without any prohibition, review, restriction or control by the State.

The pricing of one of the brands involved in the instant matter is even more demonstrative of this fact.

SMIRNOFF Vodka is distributed by three wholesalers in the Metropolitan area, namely, Peerless Importers Inc., Charmer Industries and Star Industries. Petitioner's supplier of that brand was Star Industries. The schedule filed by Star for the month of June, 1981 (a copy of which is annexed hereto as Exhibit "B") shows that its "legal prices" for a 1.75 bottle of SMIRNOFF, 80 proof, Vodka was \$67.77 "case price" and \$11.62 "bottle price", which bottle price is the case price divided by six bottles, or \$11.30, plus the \$.32 cents for breakage or split case, making \$11.62. In that month, Star "posted-off" that brand and fixed its "case price" at \$58.80, (reducing

its legal "case price" by \$8.97) but did not fully pass through the post-off to its "bottle price", which it arbitrarily fixed at \$10.62. In addition, it offered a discount of 2% for purchases of five (5) or more cases. Using the arbitrarily fixed bottle price, the 12% mark-up mandated automatically sets the minimum retail price at \$11.89 per bottle.

The schedule filed by Charmer Industries for the same month (annexed hereto as Exhibit "C") shows that the "legal prices" posted by Charmer for that same brand are "case price" \$67.49 and "bottle price" \$11.57. Charmer also posted-off the brand and fixed a "case price" of \$60.56 (\$1.76 higher than Star), yet *arbitrarily fixed its "bottle price" at \$10.62*, the same as the price fixed by Star, resulting in the same minimum retail price for those retailers purchasing from Charmer.

The prices filed by Peerless for that month for the same brand were exactly the same as those filed by Star Industries.

The result was that although all three (3) wholesalers "posted-off" the "case price" for that brand in that month, the post-off was not fully passed through to the "bottle prices" which were the same in all three (3) instances resulting in a minimum retail price for that brand of \$11.89 for all retailers notwithstanding which of the three (3) was their individual supplier.

It should be noted that the minimum legal mark-up for any retailer buying one (1) case or more in that month for that brand was 17.6%.

Similarly, with regard to the other brand involved in this matter, Peerless offered a post-off on the "case

price" of CHATHAM Gin, 80 proof, 1.75 litre bottle and did not pass through the full post-off to its "bottle price", thus, fixing a minimum legal mark-up for that brand in that month of 21.2% (a copy of the schedule is annexed hereto as Exhibit "D").

These mark-ups, arbitrarily fixed by the wholesalers are only indicative of the fact that the minimum retail prices are fixed by a private party. Wholesalers in many instances "post-off" a "case price" and hold the "bottle price" at its "legal price", or in many instances pass through the whole "post-off" to the "bottle price". The material point is that the wholesaler can "post-off" the price in any and every month and fix the legal minimum retail price by his action without any supervision, control, or review by the State.

It should be noted that for every major brand of liquor sold by more than one (1) wholesaler the "bottle price" in all schedules filed for a given month is the same (or within pennies) resulting in the same minimum retail price for all retailers. Without encumbering this record, a token example of this follows. For the month of December 1982, the schedules of prices to retailers filed by wholesalers handling the following brands in the Metropolitan area fixed the "bottle prices" for those brands as follows:

- 1) *CUTTY SARK SCOTCH* — 80 proof, 1.75 liter bottle: Capitol Distributors, Charmer Industries, Peerless Importers and Knickerbocker Liquors Corp. all fixed the bottle price at \$20.17;
- 2) *SMIRNOFF VODKA* — 80 proof, 1.75 liter bottle: Charmer Industries, Star Industries and Peerless Importers all fixed the "bottle price" at \$11.36;

- 3) *GORDON'S GIN* — 80 proof, 1.75 liter bottle: Charmer Industries, Capitol Distributors, Knickerbocker Liquors Corp. and Star Industries all fixed the "bottle price" at \$11.60;
- 4) *REMY MARTIN VSOP COGNAC* — 750 ML bottle; Peerless Importers, Charmer Industries, Knickerbocker Liquors Corp. and Star Industries all fixed the "bottle price" at \$19.24.
- 5) *BACARDI RUM* — 80 proof, 1.75 liter bottle: Charmer Industries and Peerless Importers fixed their respective "bottle prices" at \$12.32.

It is respectfully submitted that the statutory minimum retail pricing system as set forth in section 101-b and 101-bb of the ABC Law provides for the fixing of minimum retail prices of liquors by private parties and violates the provisions of the Sherman Anti-Trust Act of the United States.

Coupled with Petitioner's main point that the statutory pricing mechanism of liquors in our State violates the Sherman Anti-Trust Act, Petitioner contends that Bulletin 471 is illegal and invalid, being inconsistent and contrary to the express provisions of Section 101-b of the ABC Law.

Bulletin 471 issued June 29, 1973 permits a wholesaler three options with regard to the "bottle" price in a month when the wholesaler posts-off the case price; the first to reduce the bottle price proportionately, the second, not to reduce the bottle price at all, or the third, to fix the bottle price anywhere between the extremes.

Petitioner contends that the Authority had no power to permit this pricing practice and the actions of the Authority in allowing a wholesaler not to pass through the

full post-off on the case price was and is illegal and invalid.

Section 101-b of the Alcoholic Beverage Control Law provides:

" . . . 2. It shall be unlawful for any person who sells liquor or wine to wholesalers or retailers . . . (b) to grant, directly or indirectly, in price, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor . . .

. . . 3. (b) no brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor Authority, and is then in effect. Such schedule . . . shall contain, with respect to each item, the exact brand or trade name, capacity package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle price and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance shall be individual for each item and not in "combination with any other item, the discounts for quantity, if any, . . .".

Nowhere in the ABC law can there be found any basis for the Authority's action in permitting a wholesaler not to pass through the full post-off on the case price.

Further, Section 101-bb, which prohibits a retailer from advertising or selling an item of liquor at less than "cost" defines "cost" as the price of such item of liquor to the retailer plus twelve (12%) percent of such price. It then defines "price" as "the bottle price to retailers, be-

fore any discount, contained in the applicable schedule . . ." filed by the retailer's supplier pursuant to Section 101-bb in effect at the time.

Accordingly, the action of the Authority in permitting a wholesaler to post-off the "case" price without passing through the full post-off to the "bottle" price is a device to (a) offer a discount to case buyers over and above the 2% maximum prohibited by Section 101-b and (b) to increase the mandated minimum markup of 12% to a greater markup not contemplated by our legislature.

Clearly, the liquor Authority has exceeded its powers and has legislated to the extent of negating the express wording of the Alcoholic Beverage Control Law.

Thus, in the case of the two brands involved in this proceeding, the "bottle" prices set forth on the schedule are illegal.

In the case of the Chatham Gin, the "case" price of \$47.77 should reflect a "bottle" price of \$7.96. The posted "bottle" price of \$9.65, (or \$57.90 for six bottles) results in a discount for a one case purchaser of 17.5%, not the maximum 2% permitted by Section 101-b.

As to the Smirnoff Vodka, the case price of \$58.80 should reflect a "bottle" price of \$9.80. The posted "bottle" price of \$10.62 (or \$63.72 for six bottle) results in a discount for a one case purchaser of 7.7%. In addition, the supplier offered a 2% discount for the purchase of 5 or more cases.

In both cases, the scheduled prices violate Section 101-b in indirectly giving a discount in excess of 2% for quantity purchases.

Similarly, with regard to these two brands, the pricing permitted by the Authority violates the express intent of the legislature under the provisions of Section 101-bb of the ABC Law.

A purchaser of one case of the Chatham Gin at a price of \$47.77 or \$7.96 per bottle cannot sell below the scheduled "bottle" price of \$9.65 which results in a minimum markup not of 12% as mandated by the legislature, but 21.2%; and in the case of the Smirnoff Vodka the case buyer is restricted to a minimum 21.3% mark-up.

In this instant matter, if the full post-off's on the "case prices" had been passed through to the "bottle prices" for the brands involved, as they legally should have been, the minimum resale prices for those brands would have been for each,

CHATHAM GIN — "Bottle price" — $\$7.96 + 12\%$
mark-up, $\$.96 = \underline{\$8.92 \text{ M R P}}$ and

SMIRNOFF VODKA — "Bottle price" — $\$9.80 + 12\%$
mark-up, $\$1.18 = \underline{\$10.98 \text{ M R P}}$

Both of those minimum prices are well below the actual prices of \$9.54 for CHATHAM GIN and \$11.59 for SMIRNOFF VODKA at which Petitioner advertised and sold these brands.

It is respectfully submitted that Bulletin 471, which permits the wholesaler not to fully pass through a post-off on the "case price" to the "bottle price" is illegal and invalid and that the schedules filed by the Petitioner's suppliers for those brands are also invalid.

Petitioner submits that the determination of the Liquor Authority should be annulled and vacated on the

grounds that (a) the statutory minimum pricing system of liquors in our State violates the Sherman Anti-Trust Act and is unconstitutional and (b) Bulletin 471 is invalid and illegal.

/s/ Seymour Howard

Sworn to before this
27 day of December 1982.

/s/ Mary Ann Rosenberg
Notary Public

Mary Ann Rosenberg
Notary Public State of New York
No. 80-4638083
Qualified in Nassau County
Commission Expires March 30, 1983

(Exhibits A-D annexed to the Affidavit of Seymour Howard are reproduced on the following pages.)

EXHIBIT "A" - ADVERTISEMENTS OF VARIOUS WHOLESALERS

FEB 1988

LICENSED BEVERAGE JOURNAL

DECEMBER 1988

EXTRA — EXTRA



E & J Brandy News



MASS DISPLAYS TO AMASS PROFITS THIS HOLIDAY SEASON



See your
Salesman
For this
NEW
Motion
Display



	<u>EXC.* CASE COST</u>	<u>Dis. Min. Retail</u>	<u>Profit Per Case</u>
750 ML	\$59.90	\$5.99	\$11.99

1 L	79.90	7.99	15.98
-----	-------	------	-------

	<u>Dis. Min. Retail</u>	<u>Special Reduced Min. Retail-Dis.</u>	<u>December Case Cost</u>	<u>MAKE-UP</u>	<u>Profit Per Case</u>
1.75 L	\$14.99	\$12.99	\$64.95	20%	\$12.99

Enjoy Your Most Profitable Holiday Season Ever

Restoration Plans Note for your ordering convenience above product
is available through Premier Wine Distributors for on premise sales

*Includes 2% on 4 cases or more, 1% on 2-3 cases, and 1% sizes

GALLO WINE DISTRIBUTORS, INC.

Tel: 212-626-3787

914 AREAS — Southern Westchester 485-8100, Northern Westchester 785-5131
518 AREAS — Nassau 486-1000, Suffolk 873-0727, Suffolk (East of Spanish) 984-7388

Join Knickerbocker's

BEST AVAILABLE COPY

33
LICENSED BEVERAGE JOURNAL
December 17-22, 1982
Pages 14 and 15

Christmas Club...



Our 30% mark-up is like money in the bank!

The state of the economy has made this a difficult year for retailers. To overcome increased costs and disappointing profit margins, liquor stores must use every means at their disposal during the Christmas season if they are to reach their hoped for profits in 1982.

Knickerbocker offers an immediate solution to that problem with 30% mark-ups on a full line of spirits, including prestigious, nationally advertised brands of Scotch, Vodka, Cognac, Liqueurs and others. Brands that are competitively priced to give you a tremendous

profit advantage when sold by the case to commercial accounts and holiday shoppers.

Our line is so versatile it offers unlimited opportunities to build big ticket sales on gift baskets and mix n' match ensembles where our 30% mark-up gives you extra dollars of profit with every order.

Now, when those extra dollars are needed more than ever, you owe it to yourself to stock, display and sell more of Knickerbocker's 30% brands.

Put them to work in your store and they could make this Christmas your most profitable ever!

"It's our business to  help your business."

KNICKERBOCKER LIQUORS CORP.

HOTEL & CLUB
DISTRIBUTING CO.

PARK & TILFORD
DISTRIBUTING CO.

FIVE BOWLS
DISTRIBUTING CO.

KNICKERBOCKER
WINES UNLIMITED

HERE'S TO OPPORTUNITY AND THOSE WHO SEIZE IT.

Cutty Sark Leads New York With
Giant December Savings.

SIZE	1.75	LITRE	750 ML
REGULAR CASE PRICE	\$119.12	\$146.93	\$111.65
DECEMBER POST OFF	\$10.00	\$6.00	\$16.53
DECEMBER CASE PRICE*	\$106.94	\$138.12	\$93.22
MINIMUM CONSUMER RESALE	\$22.59	\$13.89	\$9.99
MINIMUM MARK-UP*	26.7%	20.6%	28.5%

*Includes 2% quantity discount.



DISTRIBUTED BY: Capital Distributors	Charm Industries	Peerless Imports	Knickerbocker Liquor Corp.
Maspeh	Ben Perlow	Alpine	Hotel & Club
Hauptauge	Bluecrest	Peerless	Park & Tilford
Hartdale	Distilled Brands	Webster Lawrence	Five Stars
Wine Imports	Standard Food	Sterling	
	S.W.L.	Gotham	

*Increased Beverage Sales
Dec. 17-22, 1942 - 14 Seven*

THE WORLD'S FINEST VODKA OFFERS YOU NEW YORK'S FINEST PROFITS IN DECEMBER.



Extra profits on 750 ml.
Extraordinary profits on litres.

SIZE	80 PROOF 1.75 LITRE	80 PROOF LITRE	80 PROOF 750 ML.
DECEMBER CASE PRICE*	\$102.45	\$113.45	\$88.84
DECEMBER POST-OFF	\$6.00	\$12.00	\$12.00
DECEMBER SAVINGS*	\$8.09	\$14.32	\$13.81
DECEMBER RESALE	\$20.99	\$12.29	\$9.75
PROFIT PER BOTTLE	\$3.92	\$2.84	\$2.35
MINIMUM MARK-UP*	22.9%	30%	31.7%

*Includes 2% quantity discount.

IMPORTED FINLANDIA® THE WORLD'S FINEST VODKA.™

Distributed by:

Capital Distributors:

Manhattan
Rampage
Rattlesdale
Wine Imports

Charmer Industries:

Ben Parlow
Blumcrest
Distilled Brands
Standard Food
S.W.L.

Peerless Importers:

Alpine
Peerless
Webster Lawrence
Starling
Getham

Knickerbocker Liquor Corp.

Hotel & Club
Park & Tiffard
Five Bars

DISTILLED FROM GRAIN. 80 AND 100 PROOF VODKA. IMPORTED BY THE BUCKINGHAM CORP. N.Y. N.Y.

*Licensed Beverage Importer
Dec 17-22, 1962, 17 Ave*

SCHEDULE OF LIQUOR PRICES TO RETAILERS

Reg. No. & Brand Name	Size	Age of Spirit	Proof	Legal Price per Bottle	Post Office Price per Bottle	Discount to Quantity	Minimum Bottle No. sold
CONTINUATION OF DOMESTIC VODKAS							
#0521-500 BRONSON VODKA	SC 34	100%	100				
	1.75L	B		0.95	63.77	10.75	28 5+
	1L	B		6.16	72.01	6.15	ASSTD.
	750ML	B		4.85	56.28	4.77	12
	500ML	B		3.21	75.11		12
#0521-1609 AJURSKA	200ML	B		1.47	68.51		24
							48
	1.75L	B	100	11.01	64.16	10.56	24 5+
	1L	B		6.41	74.99	6.33	ASSTD.
	750ML	B		5.12	59.53	5.05	12
#0521-1608 AJURSKA	500ML	B		3.31	77.53	3.21	12
	200ML	B		1.62	75.79	1.47	24
							48
	1.75L	B	80	9.03	52.27	8.87	24 5+
	1L	B		5.14	59.71	5.13	ASSTD.
#0521-1679 D. MR. BOSTON VODKA	750ML	B		3.95	45.50	3.94	12
	500ML	B		2.86	66.73	2.78	24
	200ML	B		1.33	62.12	1.28	48
#0521-1579 D. MR. BOSTON VODKA	1L	B	100	5.79	67.61		
	750ML	B		4.73	54.82		
	500ML	B		3.04	71.04		
	200ML	B		1.42	66.06		
#0521-803 AIRNOFF VODKA	SC 37		80				
	1L	B		5.20	60.52	4.99	24 5+
	750ML	B		4.06	46.74		ASSTD.
	500ML	B		2.71	63.16		12
	200ML	B		1.19	55.19	1.14	24
#0521-803 AIRNOFF VODKA							48
	1.75L	B	100	13.87	81.31		
	1L	B		8.17	96.11	8.15	
	750ML	B		6.28	73.38	6.26	
	500ML	B		4.15	97.78		
#0521-803 AIRNOFF VODKA	200ML	B		1.82	85.31		
	1.75L	B	80	11.62	67.77	10.62	24 5+
	1L	B		6.82	79.91	6.74	ASSTD.
	750ML	B		5.23	60.78	5.23	12
#0521-1735 AIRNOFF DE CZAR	500ML	B		3.46	81.13	3.46	24
	200ML	B		1.48	68.91	1.48	48
#0521-1735 AIRNOFF DE CZAR	SC 26		82.6				
	750ML	B		9.96	117.57	5.51	12 24 5+
	500ML	B		6.71	159.07		ASSTD.
#0521-1709 AIRNOFF SILVER AGEL	SC 26		90.4				
	1.75L	B		12.96	75.83		
	1L	B		7.66	89.97		
	750ML	B		5.92	69.14		
	500ML	B		3.99	93.94	3.98	
#0521-1709 AIRNOFF SILVER AGEL	200ML	B		1.70	74.62		

STAR INDUSTRIES, INC.

(NAME OF LICENSEE)

LEGAL PRICE must always be shown and is the EFFECTIVE PRICE except where a POST OFF PRICE is also shown.

MINIMUM BOTTLE RESALE must be shown. It represents the legal bottle price for post off bottle price if item is posted off this month. 12% rounded to nearest cent.

Syracuse, New York 11791

(CITY, TOWN OR VILLAGE)

Schedule of Liquor Prices to Retailers

Effective Month of JUNE 19 51

This can be type or printed

SCHEDULE OF LIQUOR PRICES TO RETAILERS

TYPE OF BEVERAGE & BRAND NAME	SIZE	AGE NO. IN BOTTLE	DOSE	LEGAL PRICE		POST OFF PRICE		TOP OFF PER CASE	DISCOUNT FOR QUANTITY
				PER BOTTLE	PER CASE	PER BOTTLE	PER CASE		
DOMESTIC VODKA	1.75L		8C.C	9.07	52.528	8.87	51.31	6	2 1/2 5
	1 L			5.13	59.63H	5.13	58.63	12	-A-
	75CM			4.09	47.19H	3.94	45.41	12	
	50CM			2.81	65.47H	2.80	65.36	24	
	20CM			1.35	63.05H	1.33	62.01	48	
DOMESTIC VODKA	1.6		8C.C	.39	44.87			120	.44
	1.75L		8C.C	0.95	63.77H	0.75	62.56	6	2 1/2 5
	1 L			6.16	72.01H	6.15	71.86	12	-A-
	75CM			4.85	56.28H	4.77	55.30	12	
	50CM			3.22	75.29H	3.22	75.25	24	
DOMESTIC VODKA	20CM			2.57	69.36H	2.84	66.34	24	
	1.6			1.47	62.51			48	1.65
	1.75L		8C.C	9.96	117.57			12	1.16
	1 L			0.71	159.07			24	7.52
	75CM			2.96	75.83			6	4.52
DOMESTIC VODKA	1.75L		8C.C	2.96	75.83			12	8.58
	1 L			7.66	89.97			12	6.63
	75CM			5.92	69.14			24	4.46
	50CM			3.58	93.54			48	1.90
	20CM			1.70	75.62			20	.46
DOMESTIC VODKA	1.6		8C.C	.41	46.73			20	.46
	1.75L		8C.C	1.57	67.49H	1.62	60.56	6	2 1/2 5
	1 L			6.74	78.98H	6.74	77.48	12	-A-
	75CM			5.23	60.78H	5.23	59.53	12	
	50CM			3.46	81.13H	3.46	79.63	24	
DOMESTIC VODKA	20CM			1.42	68.91H	1.48	67.41	48	
	1.6		8C.C	.37	42.58			120	.41
	1.75L		8C.C	3.67	81.31			6	5.53
	1 L			8.17	96.11H	8.15	95.91	12	5.13
	75CM			6.27	73.37H	6.26	73.24	12	7.01
DOMESTIC VODKA	50CM			4.15	97.78			24	4.65
	20CM			1.82	85.31			48	2.04
	1.75L		8C.C	9.46	54.85H	9.28	53.78	6	10.35
	1 L			5.37	62.56			12	6.01
	75CM			4.34	50.18			12	4.86
DOMESTIC VODKA	50CM			2.83	67.28H	2.83	66.02	24	3.17
	20CM			1.27	59.23H	1.25	58.06	48	1.40
	1.75L		8C.C	9.76	56.65H	9.18	53.17	6	10.28
	1 L			5.68	66.20H	5.60	65.30	12	6.27
	75CM			4.27	45.30			12	4.78
DOMESTIC VODKA	50CM			3.11	72.71			24	3.48
	20CM			2.95	68.78H	2.94	68.55	24	3.29
	1.75L		8C.C	1.46	68.30			48	1.64
	1 L								
	75CM								

CEARMER INDUSTRIES INC.

NAME OF VESSEL

ASTORIA, N.Y. 11103 and SMITHTOWN, N.Y. 1178

(CITY, TOWN OR VILLAGE)

SCHEDULE OF LIQUOR PRICES TO RETAILERS

EFFECTIVE MONTH OF ~~JULY~~ 19 ~~61~~

LEGAL PRICE must always be shown and is the

EFFECTIVE PRICE except where a **POST-OFF PRICE**

Page No. 15

BEST AVAILABLE COPY

EXHIBIT "D" - PAGE FROM BEVERAGE MEDIA
PEERLESS IMPORTERS JUNE 1981 [EXCERPT]

Size	Bot.	Case	Resale	SAVE
VODKA				
VODKA AMERICAN				

SMIRNOFF 80°					
20648	1.75	10.62	58.80	11.89	6.93
14281	1 L	6.74	77.48	7.55	12.50
78280	750	5.23	59.53	5.86	12.50
14290	500	3.46	79.63	3.88	12.50
66605	200	1.48	67.41	1.66	12.50
2% 5 cs. or more asst.					

16A—See Beginning of List for Codes, Discounts, Limitations

BEVERAGE MEDIA—JUNE, 1981

APPENDIX D

Verified Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

324 LIQUOR CORP., d/b/a
YORKSHIRE WINE & SPIRITS,

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

EDWARD J. McLAUGHLIN, HUGH B. MARIUS,
ROBERT DOYLE, TERRENCE R. FLYNN and
FREDERICK PANNOZZO,

Respondents.

VERIFIED ANSWER

Index #4014/83

Respondents, for their answer to the petition herein,
by their attorney, ROBERT ABRAMS, Attorney General
of the State of New York, respectfully allege:

1. Deny each and every allegation contained in paragraphs "FOURTEENTH", "FIFTEENTH" and "SIXTEENTH" thereof.

2. Deny each and every allegation contained in paragraph "TENTH" thereof, except admit that petitioner's legal claims are summarized therein.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in para-

graphs "ELEVENTH", "TWELFTH" and "THIRTEENTH" thereof, except as the official text of the reference cited therein may otherwise show and respectfully refer thereto for their interpretation.

AS AND FOR A FIRST, SEPARATE
AND COMPLETE DEFENSE

4. That the proceedings described in paragraphs "FOURTH" through "NINTH" of the petition were conducted by respondents or under their authority pursuant to the powers vested in them by the Twenty-first Amendment to the United States Constitution and the New York State Alcoholic Beverage Control Law.

5. That a true copy of the transcript of the hearing held before Deputy Commissioner Andrew Lee Aubry on January 20, 1982 will be submitted to the Court with this answer.

6. That a copy of the Hearing Commissioner's report which formed the basis for the respondents' determination is annexed as Exhibit I.

7. That the determination sought to be reviewed and annulled herein was neither arbitrary, capricious nor unlawful, but was made pursuant to law and in the sound exercise of respondents' discretion.

AS AND FOR A SECOND, SEPARATE AND
COMPLETE DEFENSE AND BY WAY OF
OBJECTION IN POINT OF LAW

8. The petition fails to state facts entitling petitioner to the relief sought.

WHEREFORE, it is respectfully requested that the respondents' determination be confirmed and that the petition be dismissed.

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-2464

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says:

That he is an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for respondents. That he is fully familiar with the facts of this case and makes this verification pursuant to CPLR 3020(d)(2).

That he has read the foregoing answer and knows the contents thereof and the same is true to my own knowledge, the basis of which is respondents' records and other documents in his possession.

/s/ Robert S. Hammer

Sworn to before me this
10 day of March, 1983

/s/ Daniel D. Kaplan
Assistant Attorney General
of the State of New York

(The Exhibits annexed to the Verified Answer
are not reproduced herein.)

APPENDIX E

Affidavit — Robert S. Hammer In Opposition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____/

In the Matter of the Application of
324 LIQUOR CORP., d/b/a
YORKSHIRE WINE & SPIRITS,

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

EDWARD J. McLAUGHLIN, HUGH B. MARIUS,
ROBERT DOYLE, TERRENCE R. FLYNN and
FREDERICK PANNOZZO,

Respondents.

_____/

AFFIDAVIT

Index #4014/83

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says:

That he is an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for respondents herein. That he is fully familiar with the facts of this case and makes this affidavit in opposition to petitioner's application.

Subsequent to the rendering of the Hearing Commissioner's report, counsel for petitioner submitted a memorandum to the respondents. A copy of that memorandum is annexed as Exhibit A. At respondents' request, their counsel submitted a response, a copy of which is annexed as Exhibit B.

/s/ Robert S. Hammer

Sworn to before me this
10 day of March, 1983

/s/ Daniel D. Kaplan
Assistant Attorney General
of the State of New York

(Reproduced on the following pages are the Exhibits annexed to the Affidavit of Robert S. Hammer.)

EXHIBIT "A"—LICENSEE'S MEMORANDUM
AFTER HEARING

IN THE MATTER OF PROCEEDINGS
AGAINST

324 Liquor Corp.
(YORKSHIRE WINE & SPIRITS)

RESPONDENT'S MEMORADUM

The licensee is charged with violating Section 101-bb by selling and advertising two items of liquor below the minimum resale price on June 24, 1981.

The Bill of Particulars served by the Authority specifies the two items sold and advertised as Chatham 90 proof Gin, 1.75 liter bottle for \$9.54 plus sales tax and 1.75 bottle of Smirnoff 80 proof Vodka at \$11.59 plus sales tax. The Authority claims the minimum resale price (MRP) for the Chatham Gin at the time was \$10.27 plus sales tax and for the Smirnoff Vodka, \$12.51 plus sales tax.

The licensee contends that the miniraum resale prices relied upon by the Authority are illegal for the following reasons:

1. The MRP claimed by the Authority for both brands includes an amount of 62 cents which consists of New York City excise tax plus wholesalers 20% markup on the tax plus 12% of that resultant amount. The inclusion of that amount has been ruled invalid by the Court of Appeals in the case of *MANCINI v. McLAUGHLIN*, et al.

2. Rule 65.4 of the Liquor Authority compels wholesalers to add an amount per bottle for split case sales, de-

pendent upon the number of containers in a case. Respondent claims that the Authority had no power to promulgate that rule and the amount added to the "bottle" price pursuant to that rule should be deducted from the schedule "bottle" price.

3. The main schedule relied on by the Authority indicates that with regard to both brands the supplier offered a post-off on each brand in the month of June and did not pass through the full post-off on the case price to the bottle price.

Specifically, the schedule shows that 1.75 liter of Chatham 90 proof Gin, which was scheduled at a legal case price of \$85.59 and legal bottle price of \$14.59 was offered that month at post-off with a case price of \$47.77 and bottle price of \$8.62. The schedule indicates the supplier had posted-off the bottle price somewhere between the full post-off and the legal bottle price. That is indicated by the letter "M" in the third column.

The same situation pertained to the 1.75 liter of 80 proof Smirnoff Vodka. The legal case price filed was \$67.77 and the legal bottle price \$11.62. The post-off case price was \$58.80 and the post-off bottle price \$10.62. Again the full case price post-off was not passed through to the bottle price post-off.

In addition to the above, the supplier offered on the Smirnoff Vodka a quantity discount of 2% for the purchase of 5 or more cases.

Respondent contends that in both instances the "bottle" price for the subject brands should legally be \$7.96 for the Chatham and \$9.80 for the Smirnoff Vodka.

Bulletin 471 issued June 29, 1973 permits a wholesaler three options with regard to the "bottle" price in a month when the wholesaler posts-off the case price; the first to reduce the bottle price proportionately, the second, not to reduce the bottle price at all, or the third, to fix the bottle price anywhere between the extremes.

Respondent contends that the Authority had no power to permit this pricing practice and the actions of the Authority in allowing a supplier to permit a wholesaler not to pass through the full post-off on the case price was and is illegal and invalid.

Section 101-b of the Alcoholic Beverage Control Law provides:

"... 2. It shall be unlawful for any person who sells liquor or wine to wholesalers or retailers . . . (b) to grant, directly or indirectly, in price, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor . . .

. . . 3. (b) no brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor Authority, and is then in effect. Such schedule . . . shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle price and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance shall be individual for each item and not in "combination" with any other item, *the discounts for quantity, if any, . . .*"

Nowhere in the ABC Law can there be found any basis for the Authority's action in permitting a wholesaler not to pass through the full post-off on the case price.

Further, Section 101-bb, which prohibits a retailer from advertising or selling an item of liquor at less than "cost" defines "cost" as the price of such item of liquor to the retailer plus twelve (12%) percent of such price. It then defines "price" as "the bottle price to retailers, before any discount, contained in the applicable schedule . . ." filed by the retailer's supplier pursuant to section 101-bb in effect at the time.

Accordingly, the action of the Authority in permitting a wholesaler to post-off the "case" price without passing through the full post-off to the "bottle" price is a device to (a) offer a discount to case buyers over and above the 2% maximum prohibited by Section 101-b and (b) to increase the mandated minimum markup of 12% to a greater markup not contemplated by our legislature.

Clearly, the liquor Authority has exceeded its powers and has legislated to the extent of negating the express wording of the Alcoholic Beverage Control Law.

Thus, in the case of the two brands involved in this proceeding, the "bottle" prices set forth on the schedule are illegal.

In the case of the Chatham Gin, the "case" price of \$47.77 should reflect a "bottle" price of \$7.96. The posted "bottle" price of \$9.65, (or \$57.90 for six bottles) results in a discount for a one case purchaser of 17.5%, not the maximum 2% permitted by Section 101-b.

As to the Smirnoff Vodka, the case price of \$58.80 should reflect a "bottle" price of \$9.80. The posted

"bottle" price of \$10.62 (or \$63.72 for six bottles) results in a discount for a one case purchaser of 7.7%. In addition, the supplier offered a 2% discount for the purchase of 5 or more cases.

In both cases, the scheduled prices violate Section 101-b in indirectly giving a discount in excess of 2% for quantity purchases.

Similarly, with regard to these two brands, the pricing permitted by the Authority violates the express intent of the legislature under the provisions of Section 101-bb of the ABC law.

A purchaser of one case of the Chatham Gin at a price of \$47.77 or \$7.96 per bottle cannot sell below the scheduled "bottle" price of \$9.65 which results in a minimum markup not of 12% as mandated by the legislature, but 21.2%; and in the case of the Smirnoff Vodka the case buyer is restricted to a minimum 21.3% markup.

4. Respondent claims that the MRP is price fixing by a private party with no supervision or review by the State Liquor Authority, and comes within the holding of *CAL. LIQUOR DEALERS ASS'N v. MIDCAL ALUM.*, 445 U.S. 97, 100 S. Ct. 937.

CONCLUSION

The charges against this licensee should be dismissed.

Respectfully submitted,
SEYMOUR HOWARD
Attorney for Respondent
380 North Broadway
Jericho, New York 11753

EXHIBIT "B"—MEMORANDUM OF STATE
LIQUOR AUTHORITY COUNSEL

MEMORANDUM

State Liquor Authority
Zone 1

Date: September 27, 1982

To: Barbara J. Lord, Secretary to the Authority
From: Office of Counsel
Subject: Prior Agenda Item 821400
NEW YORK L 4967
324 Liquor Corp.
dba Yorkshire Wine & Spirits
324 East 86th Street
New York, New York 10028

This is in response to your memorandum of August 26, 1982.

With reference to the points raised in the licensee's memorandum of law, we submit as follows:

Section 101-bb-2(b) of the Alcoholic Beverage Control Law states, in part, that "'cost' shall mean the price of such item of liquor to the retailer plus twelve percentum of such price." This section further states, in part, that the "term 'price' shall mean the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section 101-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor." * * *

The Authority's Rule 16.4(e) (9 NYCRR 65.4) states:

"For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price

by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority."

The Authority's Bulletin No. 471 (series 1973) dated June 29, 1973, permits case prices to be posted-off without an accompanying reduction in bottle prices. This Bulletin (copy attached) permits wholesalers, after posting-off the case price to (1) not reduce the bottle price; (2) reduce the bottle price to conform with the post-off case price and (3) adopt a bottle price anywhere between the extremes authorized under 1 and 2.

The licensee's attorney makes the following arguments:

I. The minimum consumer resale price includes 62 cents of New York City excise tax and this inclusion is invalid pursuant to *Mancini* case.

Counsel's Reply:

The charge was based on advertising and/or selling Chatham gin and Smirnoff vodka at a price less than cost (12 percentum above the price contained in the applicable schedule). The schedule for Chatham gin listed a minimum resale bottle price of \$9.65 plus sales tax and the licensee sold for \$9.45 plus sales tax. The schedule for Smirnoff vodka listed a minimum resale bottle price of \$11.89 plus sales tax and the licensee sold for \$11.59 plus sales tax.

It is irrelevant to this case as to how the wholesaler arrived at the scheduled price.

II. Rule 16.4 compels wholesalers to add an amount per bottle for split case sales and the Authority had no power to promulgate this Rule.

Counsel's Reply:

This Rule gives the method of calculating a bottle price as a proportion of a scheduled case price. Section 101-bb defines the cost to the retailer as being the price of the liquor plus 12 percent. This section defines price as the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the Authority pursuant to section 101-b.

Rule 16.4 does not contradict this section but merely amplifies it.

III. The main schedule listed case post-offs on both brands and did not pass through the full post-off on the case price to the bottle price.

Counsel's Reply:

Although Rule 16.4 gives the method of calculating a bottle price as a proportion of a scheduled case price, the rule further states that "variations will not be permitted without approval of the authority." Bulletin 471 lists the approved method by which a wholesaler may pass on none, part, or all of a post-off case price savings to the bottle price. By its terms, this Bulletin provides "approved" variations from the Rule.

IV. Under section 101-b, subd. 2(b), it is unlawful for any person who sells alcoholic beverages to wholesalers or retailers to grant any discounts, rebates, free goods, allowances or any other inducements of any kind whatsoever except a discount not to exceed two percent for quantity of liquor. * * *

Counsel's Reply:

This prohibition applies to volume discounts for numbers of cases and prohibits price discrimination by whole-

salers in selling to selected retailers. This is irrelevant to the charge in this case.

V. Under section 101-b(3), the schedules filed by the wholesalers must list the bottle price and case price to retailers, "the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in 'combination' with any other item, the discounts for quantity, if any . . ."

Counsel's Reply:

This is irrelevant to the charge in this case because the issue of a volume discount is not involved herein.

VI. Under the holding of *California v. Midcal*, the minimum resale price is price fixing by a private party with no supervision or review by the State Liquor Authority.

Counsel's Reply:

This issue is presently the subject of litigation in *Matter of Battipaglia v. Bacchus*, which is being handled by the Attorney General's Office and is pending in the United States District Court for the Southern District of New York.

/s/ STANLEY STEIN
ACTING COUNSEL TO THE
AUTHORITY

HSG:pc

APPELLANT'S BRIEF

(6)
No. 84-2022



In the Supreme Court of the United States

October Term 1985

— o —
324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

v.

THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN AND FREDERICK PANNOZZO,

Appellees.

— o —
ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF OF APPELLANT

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Questions Presented

At issue in this case is the constitutionality of a New York statute that empowers wholesalers to fix the minimum retail price of liquor sold by retailers for off-premises consumption. Specifically, Section 101-bb of the New York Alcoholic Beverage Control Law requires retailers to resell liquor at a retail price no less than 12 percent above the "bottle price" determined by the liquor wholesaler in its unfettered discretion and without state supervision. Since this "bottle price" under the statute need not, and usually does not, correspond to the retailer's cost for the item, appellant was found to have violated the statute by selling liquor at retail prices which yielded mark-ups in excess of 18 percent.

Two New York intermediate appellate courts invalidated the statute under the Supremacy Clause of the United States Constitution because it sanctioned resale price maintenance in violation of the Sherman Act. Although finding that New York retail "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (JS App. 10A), the New York Court of Appeals reversed, holding that the statute was saved from invalidation under § 2 of the Twenty-first Amendment. In reaching this result, the court below distinguished the Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The questions presented in this appeal are as follows:

1. Is a state statute that empowers a wholesaler in its unfettered discretion and without state supervision to fix the minimum retail price for liquor in-

valid under the Supremacy Clause in that it authorizes resale price maintenance in violation of the federal antitrust laws?

2. Is a state retail liquor pricing statute which violates the Sherman Act immune from Supremacy Clause attack under the *Midcal* balancing test when nothing more than legislative history concerning the statute's purpose is proffered to substantiate the claim that the statute promotes the state's interest in preserving small liquor retailers?

3. Is the claimed state interest in preserving small liquor retailers from the effects of price competition sufficiently related to the core principles underlying the Twenty-first Amendment to override the substantial federal interest in a vigorously competitive economy as embodied in the Sherman Act, particularly where the claimed state interest could be served by less anti-competitive alternatives?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. Appellant has no parent companies, subsidiaries or affiliates as those terms are used in Supreme Court Rule 28.1.

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In the Supreme Court of the United States

October Term 1985

324 LIQUOR CORP., d/b/a/ YORKSHIRE WINE & SPIRITS,
Appellant,

v.

THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN AND FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF OF APPELLANT

Opinions Below

The opinion appealed from of the New York Court of Appeals is reported at 64 N.Y.2d 504, 490 N.Y.S.2d 143, 479 N.E.2d 779 (1985) (JS App. 1A-28A).¹ The opinion

¹ The following citation abbreviations are used herein: "JS App." refers to the printed appendix to the Jurisdictional Statement; "J.A." to the Joint Appendix.

of the intermediate appellate court—the Supreme Court of the State of New York, Appellate Division for the First Judicial Department—is reported at 102 A.D.2d 607, 478 N.Y.S.2d 615 (1984) (JS App. 29A-37A). The opinion of the court of initial jurisdiction—the Supreme Court of the State of New York, County of New York, Special Term I—is reported at 119 Misc. 2d 746, 464 N.Y.S.2d 355 (1983) (JS App. 38A-41A). The Order of Suspension entered against appellant by the New York State Liquor Authority (“SLA”) is not reported (JS App. 42A-45A); neither is the Hearing Officer’s Report setting forth the factual findings which underlie the Order of Suspension (JS App. 46A-48A). Also contained in the printed appendix to the Jurisdictional Statement is the opinion of an intermediate appellate court—the Supreme Court of the State of New York, Appellate Division for the Second Judicial Department—in a case consolidated for decision with the instant case in the Court of Appeals. *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*, 102 A.D.2d 240, 478 N.Y.S.2d 318 (1984) (JS App. 49A-57A).

Jurisdiction

Appellant 324 Liquor Corp., d/b/a Yorkshire Wine & Spirits, appeals from the final judgment of the New York Court of Appeals holding that New York Alcoholic Beverage Control Law, § 101-bb (McKinney 1970 & Supp. 1984-85) (“Section 101-bb”), is immunized by § 2 of the Twenty-first Amendment from attack under the Supremacy Clause

of the United States Constitution as in conflict with Section 1 of the Sherman Act, 15 U.S.C. § 1.

The opinion of the New York Court of Appeals was handed down on April 2, 1985. The Court of Appeals reversed the decision of the Appellate Division, First Department, and reinstated the judgment of the Supreme Court, New York County, dismissing appellant’s petition to annul the Order of Suspension.

Notices of appeal to this Court were timely filed on May 24, 1985 with the court possessed of the record in this case (Supreme Court, New York County) and on May 25, 1985 with the court from whose judgment this appeal is taken (New York Court of Appeals) (JS App. 58A-61A).

This appeal was docketed in the Court within 90 days of the decision of the Court of Appeals below. The Court’s jurisdiction is invoked under 28 U.S.C. § 1257(2). Probable jurisdiction was noted by Order of March 24, 1986. 54 U.S.L.W. 3623 (U.S.).

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the Supremacy Clause of, and § 2 of the Twenty-first Amendment to, the United States Constitution; Section 1 of the Sherman Act, 15 U.S.C. § 1; a New York statute, New York Alcoholic Beverage Control Law, § 101-bb (McKinney 1970 & Supp. 1984-85); a regulation promulgated by the SLA, New York Administrative Code title IX § 65.4 (1980); and Bulletin 471 issued by the

SLA. These constitutional, statutory and regulatory provisions are reproduced at JS App. 62A through 73A.

Statement of the Case

1. *The Parties.* Appellant is a New York corporation with its principal place of business in New York City. Pursuant to a liquor license granted by the SLA, appellant operates a single retail liquor store on the east side of Manhattan, selling liquor and wine to the general public for off-premises consumption.

The appellees are the Commissioners of the SLA appointed by the Governor of the State of New York. Created under the provisions of New York's Alcoholic Beverage Control Law (the "ABC Law"), the SLA is responsible for administering New York's laws governing the distribution and sale of alcoholic beverages.

2. *The ABC Law.* New York has established a three-tier liquor distribution system in which manufacturers, wholesalers and retailers are subject to different pricing requirements. Only the provision relating to retail pricing of liquor is at issue in this case.

Under the ABC Law, manufacturers are required to file monthly schedules with the SLA containing their prices to wholesalers. A manufacturer may set prices in these schedules at any level desired, so long as it files an affirmation with the SLA stating that the prices reflected in the schedule are no higher than the lowest prices charged to wholesalers in any other state. ABC Law,

§ 101-b(3)(a), (3)(d).² The ABC Law does not authorize a manufacturer to control in any way the prices at which wholesalers resell liquor to retailers.

Under the ABC Law, each month a wholesaler is required to file with the SLA a price schedule for the brands of liquor it distributes. In the first schedule filed by a wholesaler after it has acquired the distribution rights to a particular brand of liquor, both a "case price" and a "bottle price" for that brand is set by the wholesaler without state involvement or supervision. *Id.*, § 101-b(3)(b) (JS App. 67A).³ These "legal prices" set in the first schedule establish a price ceiling, or maximum price level: the ABC Law prohibits the wholesaler from charging a higher price, except to reflect increases in its suppliers' prices. ABC Law § 101-b(3)(b) (JS App. 68A). In any given monthly schedule, however, a wholesaler may, without restriction or state supervision, "temporarily" reduce its case and bottle price by means of a so-called "post off". Although both legal and post-off prices must appear on the monthly schedules filed by wholesalers with the SLA,

2 The constitutionality of these provisions of the New York law has been challenged in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, No. 84-2030 (U.S.) (argued and currently pending before the Court).

3 Under SLA Rule 16, the "bottle price" multiplied by the number of bottles in a case "must exceed the case price by [a 'breakage' surcharge of] approximately \$1.92." N.Y. Admin. Code tit. IX, § 65.4(e) (1980) (JS App. 70A).

the wholesale sale is made at the post-off price (J.A. 21-22, 36).⁴

The ABC Law does not mandate any particular wholesale prices; it requires only that the wholesaler's prices be filed monthly and adhered to during the following month. A wholesaler is free to set both its initial legal price and its post-off prices, in its unfettered discretion, without state supervision, and without any reference to the price paid by the wholesaler for the item in question (J.A. 21-23).⁵

3. *The Challenged Provision.* Section 101-bb authorizes liquor wholesalers to control minimum retail prices and prohibits retailers from reselling below the retail prices established by the wholesalers. Specifically, Section 101-bb[2] prohibits retailers from selling below "cost", and defines "cost" by applying a 12 percent minimum mark-up to the "bottle price" set by the wholesaler for that month (JS App. 64A-65A). Under Section 101-bb,

4 The monthly schedules must be filed by wholesalers by the fifth day of the month preceding the day in which the schedule is to take effect. ABC Law, § 101-b[4] (JS App. 68A-69A). Within ten days thereafter, the SLA must make all schedules available for inspection by the general public, including other wholesalers. *Id.* Wholesalers have three days from the time that schedules become available for inspection to amend their schedules to meet (but not to undercut) lower prices contained in schedules of competing wholesalers. *Id.*

5 The constitutionality of the price posting provisions relating to liquor wholesalers is not at issue here. Thus, this case is distinguishable from *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985), where the Second Circuit rejected an antitrust challenge to the provisions of the ABC Law requiring that wine wholesalers file their monthly prices in the month preceding their effectiveness and then adhere to the scheduled prices for the full month. ABC Law, § 101-b[3], [4] (JS App. 67A-69A).

the "bottle price" in effect at the time of the retail sale determines the minimum retail price notwithstanding that the retailer has purchased the item in question at a different price. Thus, it is irrelevant that the retailer acquired the item in question as part of a case at a lower "case price", or that the retailer acquired the item during a different month when different prices were in effect.

Under Bulletin 471 promulgated by the SLA in 1973, when a wholesaler posts off its case price in any given month, it need make no corresponding reduction in its bottle price. To the contrary, Bulletin 471 expressly authorizes a wholesaler who posts off a case price to select from one of three alternatives as to the bottle price: (1) reducing the bottle price by the proportionate amount of the post off on the case price (after adding a "breakage" surcharge of \$1.92 (see n.3)); (2) reducing the bottle price by some lesser amount; or (3) not reducing the bottle price at all (JS App. 71A-73A). Bulletin 471 was specifically upheld under Section 101-bb in the decision below.⁶

Bulletin 471 thus permits wholesalers to control whether and to what extent reduced, or "post-off", whole-

6 In rejecting appellant's contention below that Bulletin 471 was invalid under Section 101-bb—in that it permitted a wholesaler not to make corresponding adjustments in the bottle price when it posted off the case price—the Court of Appeals held that, under the statute, the wholesaler's bottle price need bear no relation to the case price (JS App. 19A). Specifically the court below concluded that Bulletin 471 is consistent with Section 101-bb since the statute does not "mandate any price ratio between scheduled case and bottle prices" (JS App. 18A). On this issue of state law, the decision of New York's highest court is, of course, conclusive. See, e.g., *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978).

sale case prices will be reflected in reduced retail prices (JS App. 5A). As the wholesaler schedules in the record demonstrate (J.A. 16-17, 36-38), while on some occasions bottle prices are reduced to the full extent of the case price post-off, in many instances wholesalers set bottle prices that reflect none, or only a part, of the reduction in the case price.

Consequently, liquor wholesalers in New York are free to establish as great a differential as they desire between the bottle price and the appropriate fraction of the case price and thereby guarantee retailers mark-ups substantially in excess of 12 percent. Wholesalers, in advertisements appearing in New York liquor industry trade journals, proclaim their ability to produce supracompetitive profits for retailers as a principal marketing inducement. Such advertisements refer to actual retail mark-ups ranging between 20 to in excess of 30 percent (J.A. 23-27, 32-35; JS App. 100A). In one advertisement, a wholesaler boasted that it offered an "Exclusive Formula For Extra Profits": "Our 30% markup [that] gives you extra dollars of profit with every order" (J.A. 33) (emphasis supplied). This wholesaler added: "Our 30% markup is like money in the bank! ... It's our business to help your business" (*id.*) (emphasis supplied). This practice has continued since the decision below (JS App. 100A).

Section 101-bb also makes the bottle price set by the wholesaler for the month when the retail sale occurs the determinant of the minimum retail price, notwithstanding that the retailer has purchased the item during a different month when a different bottle price was posted by the wholesaler. Thus, under Section 101-bb a wholesaler may,

without SLA approval, manipulate its prices from month to month, by establishing low post-off prices to retailers in one month, and—as a marketing inducement to encourage retailers to stock up—announce in an advertisement in a liquor journal that it will set the minimum retail price for the next month at a substantially higher level, thereby guaranteeing retailers supracompetitive profits (JS App. 101A). In one advertisement, for example, a wholesaler urged retailers to "Buy in August: Earn Extra Profit [of 31.3%] in September" (*id.*).

4. *Legislative History of Section 101-bb.* Prior to 1964, New York utilized a fair trade pricing scheme for liquor similar to the California wine pricing regimen struck down in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).⁷ In 1964, the Moreland Commission appointed by the Governor of New York reported—as this Court has observed—that New York consumers were being victimized as a result "of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 (1966) (footnote omitted). The Moreland Commission concluded that due to fair trade, New York consumers were overpaying for liquor by \$150 million annually. *Id.* at n.9.⁸ In response to these findings,

7 See ABC Law, § 101-c (McKinney Supp. 1964).

8 As noted in the legislative history of the 1971 revision of Section 101-bb, the Moreland Commission also concluded that high liquor prices do not necessarily inhibit or reduce the consumption of alcoholic beverages. N.Y. Sen. Excise Comm., Final Report at 7 (March 1971).

the New York Legislature in 1964 repealed fair trade, replacing it with a predecessor version of Section 101-bb.

As enacted in 1964, Section 101-bb fostered competition among liquor retailers. The 1964 version of Section 101-bb did not impose a minimum mark-up; instead, the statute prohibited retailers from selling below "cost" which was derived, under the predecessor of SLA Rule 16 (see n.3), by permitting but not requiring that a "breakage" surcharge of 96 cents be added to the case price, and dividing by the number of bottles in the case.⁹ Because the 1964 version of Section 101-bb was interpreted so that "cost" was defined with reference to the lowest wholesale price posted anywhere in the State, as opposed to the price posted by the wholesaler from whom the retailer purchased the item in question,¹⁰ it was possible for retailers to sell below their actual invoice cost without violating the statute.¹¹

The retail price competition which followed enactment of the 1964 version of Section 101-bb did not prove popular with certain liquor retailers. Responding to retailer complaints that an emphasis on price cutting and price promotions and a prevalence of "lossleader" selling was resulting in a reduction of the number of retail liquor stores, the Excise Committee of the New York Senate issued a report in 1971 which set forth the following rationale for amending Section 101-bb:

9 N.Y. Admin. Code tit. IX, § 65.4(e) (1964).

10 N.Y. Sen. Excise Comm., Final Report at 16 (March 1971).

11 *Id.*

Since it seems patent that the mass of small retailers are unable to compete with the large volume outlets that have emerged, most appear doomed barring the adoption of some formula that will permit the co-existence of both types of outlets.

N.Y. Sen. Excise Comm., Final Report 30 (March 1971) (quoted in JS App. 14A-15A).

A desire to preserve small liquor retailers from continued exposure to the rigors of price competition led the New York Legislature in 1971 to amend Section 101-bb in two respects. First, "cost" was redefined in the 1971 statute as the bottle price listed in the "applicable schedule filed . . . by [the] wholesaler from whom the retailer purchases liquor" (JS App 64A-65A).¹² Second, a minimum 12 percent mark-up based on the wholesaler's bottle price was introduced. See pp. 6-7, *supra*. The wholesaler's power to control the retail price was further enhanced with the adoption by the SLA in 1973 of Bulletin 471. See pp. 7-8, *supra*.

5. *Section 101-bb as Applied in this Case.* This case arose as a result of a newspaper advertisement—published on June 20, 1981—in which appellant offered to sell certain items below the minimum retail price for those brands established under Section 101-bb (J.A. 18). On June 24, 1981, investigators from the SLA purchased from appellant two different brands of liquor in 1.75 liter bottles: a bottle of Smirnoff Vodka for \$11.59, 30 cents less than the minimum retail price established by Star Industries, Inc. ("Star"), the wholesaler from whom appellant purchased the product, and a bottle of Chatham

12 See Senate Excise Comm. Report at 40.

Gin at \$9.45, 20 cents below the minimum retail price established by wholesaler Peerless Importers, Inc. ("Peerless") (JS App. 46A-48A).

Each of appellant's retail prices was significantly more than 12 percent above the wholesale price then in effect. In June 1981, Star was selling 1.75 liter Smirnoff Vodka in a case of six bottles at a post-off case price of \$58.80, or \$9.80 per bottle (J.A. 24-25, 36). Thus, appellant's sale of Smirnoff Vodka at \$11.59 produced an actual gross profit of \$1.79 (the retail price of \$11.59 minus the wholesale price of \$9.80) and a mark-up of 18.3 percent. Similarly, appellant's sale of Chatham Gin produced a mark-up of 18.7 percent over the wholesale price.¹³

Appellant's profit making sales were rendered illegal under New York law only because two wholesalers, each in its sole discretion, had established a substantial differential between the artificially high bottle price and the appropriate fraction of the wholesale case price. Neither sale would have violated the statute had the wholesalers not had the ability to control retail prices by setting a phantom bottle price which was the determinant for the retail price.¹⁴

13 In June 1981, Peerless had a post-off case price for 1.75 liter Chatham Gin (6 bottles to a case) of \$47.77, or \$7.96 per bottle (J.A. 25-26, 29-30). Thus, appellant's sale at \$9.45 produced a gross profit of \$1.49 (the retail price of \$9.45 minus the wholesale price of \$7.96) and a mark-up of 18.7 percent.

14 Each wholesaler could have computed its bottle price simply by adding the breakage surcharge of \$1.92 to its post-off case price and dividing by the number of containers in the case. SLA Rule 16 (JS App. 70A) (described at n.3).

(Continued on following page)

6. *The Administrative and Judicial Proceedings Below.* The SLA staff charged appellant with advertising and selling below the minimum retail price established by the wholesalers under Section 101-bb (J.A. 13-18). At the early stages of the suspension proceeding below, appellant raised the claim that Section 101-bb was invalid under the Supremacy Clause in that it authorized conduct in violation of Section 1 of the Sherman Act. The SLA Hearing Officer refused to consider this claim (JS App. 48A). Thereafter, the SLA—adopting the Hearing Officer's findings and conclusions—ordered that appellant's liquor license be suspended for ten days and that appellant forfeit a \$1,000 bond (JS App. 42A-45A).

Appellant sought to annul the Order of Suspension in the New York courts on the grounds, *inter alia*, that Section 101-bb, on its face and as applied, was repugnant to the Sherman Act and the Supremacy Clause. The Su-

Had Star done so with regard to the Smirnoff Vodka, its bottle price would have been \$10.12 (\$58.80 plus \$1.92, divided by 6), the minimum retail price after the 12 percent mark-up would have been \$11.33 and appellant's \$11.59 sale price would have been lawful. But Star—exercising the discretion upheld under Section 101-bb by the court below (see p. 7 & n.6, *supra*)—chose to set its post-off bottle price at the higher figure of \$10.62. The result was a minimum retail price of \$11.89 (after the required 12 percent mark-up on the phantom bottle price), rendering appellant's sale price illegal.

Similarly, Peerless could have set its post-off bottle price for Chatham Gin at \$8.28 (post-off case price of \$47.77 plus \$1.92, divided by 6). Had it done so, the minimum retail price would have been \$9.27, with the result that appellant's sale price of \$9.45 would not have violated the statute. Instead, Peerless exercised its discretion to set the post-off bottle price at \$8.62. The result was a minimum retail price of \$9.65 (after the 12 percent mark-up), making appellant's sale price illegal.

preme Court, New York County, denied the petition holding that Section 101-bb did not violate the Sherman Act (JS App. 38A-41A). The judgment was reversed on appeal. The Appellate Division, First Department, held that Section 101-bb sanctioned resale price maintenance in violation of the Sherman Act and was not immunized from antitrust attack under the "state action" doctrine (JS App. 29A-37A). On appeal to the New York Court of Appeals, the case was consolidated with another case in which the Appellate Division, Second Department, had concluded that Section 101-bb authorized *per se* violations of the Sherman Act and was not saved from invalidation by § 2 of the Twenty-first Amendment (JS App. 49A-57A).

The Court of Appeals reversed in a consolidated opinion. The court below first considered the SLA's contention that Section 101-bb is immune from Sherman Act challenge under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Court of Appeals rejected the claim of state action immunity, finding that here—as in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)—the active state supervision of the statutory pricing scheme necessary for application of the state action doctrine was lacking (JS App. 9A-10A).

Turning to the SLA's claims regarding the Twenty-first Amendment, the court below purported to resolve a question left open in *Midcal*, i.e., "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy" (JS App. 13A) (*quoting* 445 U.S. at 113-14). The Court of Appeals did not find that the statute served any state interest in temperance,

noting instead the determination of the Moreland Commission that a statute which provides for high retail prices does *not* inhibit consumption of alcoholic beverages (JS App. 16A n.2). Rather, the court below ruled that Section 101-bb embodied a state policy of protecting small liquor retailers from the perceived evils of price competition (JS App. 15A-17A), and that this state interest prevailed over the "generalized concerns of the Sherman Antitrust Act" (JS App. 16A). The court below therefore held that the Twenty-first Amendment shielded Section 101-bb from antitrust attack.

Since it concluded that the Twenty-first Amendment insulated the New York statute from antitrust challenge, the Court of Appeals considered it "unnecessary to determine whether Section 101-bb violates the antitrust laws" (JS App. 8A). In attempting under *Midcal* to balance federal and state interests, however, the court below found that "the state policy" allegedly served by Section 101-bb—"to maintain extensive retail outlets" and thereby "protect consumers"—was "consistent with the federal [antitrust] statutes" (JS App. 17A).¹⁵

Four judges joined in the majority opinion, a fifth concurred in the result,¹⁶ and a sixth did not participate in the case.

¹⁵ The Court of Appeals also rejected appellant's argument that the SLA exceeded its authority in issuing Bulletin 471 (JS App. 18A). See p. 7 & n.6, *supra*.

¹⁶ Judge Jansen filed a separate opinion, concurring in the majority's conclusions that the New York statute is consistent with the policies underlying the federal antitrust laws and that it is shielded by the Twenty-first Amendment, but disagreeing with the majority's holding that the statute does not qualify for the state action defense (JS App. 19A-26A).

One judge dissented. Judge Kaye would have rejected the Twenty-first Amendment defense on the ground that the state policies asserted in defense of the statute lacked a substantial basis (JS App. 26A-27A). Judge Kaye would have invalidated the statute as violative of the Sherman Act, reasoning that "[e]ven if the pricing scheme could be upheld as furthering a State policy to protect small retailers against *unfair* competition, it goes well beyond, and by fixing minimum resale prices effectively and unnecessarily forecloses *all* competition" (JS App. at 27A) (emphasis in original).

Summary of Argument

The "threshold question" in this case is whether New York's retail liquor pricing scheme is inconsistent with Section 1 of the Sherman Act (*Midcal*, 445 U.S. at 102). Because Section 101-bb manifestly authorizes *per se* violations of the Sherman Act, it is plainly invalid under this Court's decision in *Midcal*. The court below plainly erred in concluding that a state statute designed to protect small retailers from vigorous competition is consistent with the federal antitrust laws. Under the Court's precedents, New York's resale price maintenance scheme is clearly the product of concerted action.

The New York Court of Appeals correctly applied *Midcal* in concluding that the state action defense does not bar application of the Sherman Act in this case. Because New York does not actively supervise wholesalers when they set retail liquor prices in their sole discretion,

Section 101-bb fails to meet one of the two prerequisites to state action immunity recognized under *Midcal*.

The conclusion of the court below that the Twenty-first Amendment shields Section 101-bb from challenge under the federal antitrust laws represents a gross misapplication of the governing Twenty-first Amendment balancing test set forth in *Midcal*. Since New York's asserted interest in the preservation of small liquor retail establishments is entirely unsubstantiated in this case, it cannot outweigh the strong federal interest in competitive markets embodied in the Sherman Act. New York could have adopted any number of far less anti-competitive methods to protect liquor retailers from predatory pricing and "lossleader" tactics, if such protection was required. Finally, New York's interest in safeguarding small retailers from vigorous but non-predatory price competition is not at the core of state interests recognized under the Twenty-first Amendment.

Argument

I. Because It Empowers Liquor Wholesalers To Fix Retail Prices In Their Sole Discretion And Without State Involvement, Section 101-bb Violates The Sherman Act.

The New York Court of Appeals failed to recognize that Section 101-bb authorizes private parties (liquor wholesalers) to engage in vertical price fixing in violation of Section 1 of the Sherman Act. The state court's finding of consistency between New York's statutory resale

price maintenance scheme and the federal antitrust laws is contradicted by the Court's holding in *Midcal*.

A. Section 101-bb Plainly Authorizes Per Se Violations Of The Sherman Act.

In *Midcal*, the Court expressly held that Section 1 of the Sherman Act is violated when a state, by statute, authorizes persons operating at one level of distribution of alcoholic beverages to determine the prices charged by persons operating at another level without the direct involvement or supervision of the State.¹⁷ Because Section 101-bb permits the wholesaler to control retail liquor prices in its unfettered discretion, the New York statute clearly violates the Sherman Act.

Midcal involved a California statute that compelled producers of wine to fix the prices to be charged by wholesalers by, *inter alia*, filing resale price schedules with the state. 445 U.S. at 99. Wholesalers were prohibited from reselling below the prices fixed by the producer in the schedules. *Id.* After noting that resale price maintenance is *per se* unlawful, the Court held that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act [in that a] wine producer holds the power to prevent competition by dictating the prices charged by wholesalers." *Id.* at 103 (citations omitted).

¹⁷ 445 U.S. at 103-06. Long before *Midcal*, the Court had held that a liquor wholesaler commits a *per se* violation of the Sherman Act when it imposes resale price maintenance. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 385-86 (1951).

Section 101-bb is substantively indistinguishable from the California resale price maintenance statute struck down in *Midcal*. Under the New York statute, the wholesaler establishes two distinct prices—a case price and a phantom bottle price—which, as New York's highest court held below, *need bear no relation to each other* (JS App. 7A, 18A-19A). See p. 7 & n.6, *supra*. By pegging retail prices to a 12 percent minimum mark-up over the phantom bottle price set by the wholesaler, Section 101-bb effectively grants to the wholesaler "the power to prevent competition by dictating the prices charged by" its retailer customers. *Midcal*, 455 U.S. at 103. Although the New York statute contains the word "cost" (defined as 12 percent above the phantom bottle price),¹⁸ the purpose and effect of New York's statute are no different than that of California's less cleverly disguised restraint: each permits a private person operating at one level of distribution to control the prices charged when its customers resell the product.¹⁹

The record in this case amply demonstrates that Section 101-bb gives wholesalers the power to control retail prices, as the court below recognized (JS App. 9A-10A). Because each wholesaler exercised the discretion conferred by the statute to set the bottle price at levels considerably

¹⁸ Considering that the two transactions at issue in this case occurred at prices that were more than 18 percent above the wholesale price actually paid by appellant (see p. 12, *supra*), no serious claim can be made that Section 101-bb is intended to prohibit below-cost sales.

¹⁹ Because Section 101-bb authorizes vertical price restraints, this case is governed by the Court's opinion in *Midcal*, rather than its holding concerning vertical nonprice restraints in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

higher than the appropriate fraction of the case price, appellant violated a statute which purportedly establishes a 12 percent minimum mark-up even though it sold liquor at retail prices which yielded mark-ups in excess of 18 percent. See p. 12 & nn.13-14, *supra*.

Indeed, the record makes crystal clear that New York wholesalers consciously manipulate bottle and case prices so as to produce large artificial mark-ups for their retailer customers. Wholesalers publish advertisements in trade journals trumpeting that they have established minimum retail prices at levels that guarantee retailers a return of 20 to in excess of 30 percent over actual cost (J.A. 23-27, 32-35; JS App. 100A-101A). Wholesalers also manipulate their bottle prices from month to month, by establishing low post-off prices to their retailers in one month and announcing in their advertisements that they will set the minimum retail price for the next month at a substantially higher level so as to guarantee retailers profits in excess of 30 percent (JS App. 101A). Plainly, New York consumers are overpaying by millions of dollars for the liquor they purchase at retail as a result of Section 101-bb.²⁰ As in *Midcal*, the "vertical control" conferred upon wholesalers by the statute has "destroy[ed] horizontal competition as effectively as if [retailers] 'formed a combination and endeavored to establish the same restrictions . . . by

²⁰ Cf. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 39 n.9 (under the liquor fair trade statute in effect prior to 1964, New York consumers overpaid by \$150 million annually).

agreement with each other.'"²¹ A clearer violation of Section 1 as applied in *Midcal* can scarcely be imagined.²²

B. Section 101-bb Involves Concerted Action In Violation Of The Sherman Act.

It cannot reasonably be argued that Section 101-bb involves no illegal contract, combination or conspiracy in restraint of trade in that wholesalers, under the New York statute, merely set their own prices while the impact of their actions on retail prices automatically flows from the operation of the statutorily-mandated 12 percent mark-up. After *Midcal*, it cannot be disputed that when a state by statute authorizes a private party to control its customers' resale liquor prices in its unfettered discretion and without state supervision, the statute is invalid under the Supremacy Clause in that it sanctions private parties to engage in resale price maintenance. Because Section 101-bb authorizes wholesalers to set two distinct prices and to manipulate the difference between them, thereby guaranteeing supracompetitive profits to retailers (see pp. 6-9, 11-12, *supra*), the New York statute squarely falls within

²¹ 445 U.S. at 103 (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

²² *Midcal* cannot be distinguished on the ground that California's statute authorized a wholesaler to bind all other wholesalers in an area, while the New York statute does not authorize such horizontal price restraints. Although *Midcal* makes passing reference to the horizontal aspects of California's statute (445 U.S. at 100), the Court struck down the California statute as authorizing *per se* violations of the Sherman Act for the express reason that it empowered wine producers to control the prices of their respective wholesalers. *Id.* at 103-06. Thus, *Midcal* stands squarely for the proposition that a state statute which authorizes resale price maintenance is invalid under the Sherman Act. Since the New York statute also sanctions resale price maintenance, *Midcal* clearly controls here.

the class of state statutes condemned by this Court's holding in *Midcal*.

Any doubt whether a state statute which authorizes private parties to engage in *per se* violations of Section 1 of the Sherman Act satisfies the federal statute's concerted action requirement cannot survive the Court's decision in *Fisher v. City of Berkeley*, 54 U.S.L.W. 4222 (U.S. February 26, 1986). There, the Court upheld a municipal rent control ordinance against antitrust attack. Because the challenged ordinance "place[d] complete control over maximum rent levels exclusively in the hands of" a municipal agency, the Court held that Section 1 was not violated in that "[n]ot just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city." *Id.* at 4224.

In reaching this conclusion, however, the Court noted that "the pure regulatory scheme imposed by" Berkeley had to be distinguished from "hybrid" restraints in which state-imposed "nonmarket mechanisms merely enforce private marketing decisions." *Id.* The Court further recognized that "[w]here private actors are . . . granted 'a degree of private regulatory power,' the regulatory scheme may be attacked under § 1." *Id.* (citation omitted). As an example of a "hybrid" restraint that is subject to antitrust challenge, the Court pointed to the California resale price maintenance statute struck down in *Midcal*.

In light of the unfettered discretion provided to New York wholesalers to dictate liquor prices without state involvement, Section 101-bb cannot reasonably be considered "a pure regulatory scheme" like the rent control ordinance upheld by the Court in *Berkeley*. The SLA has not "unilaterally imposed" retail liquor prices in any sense. To the contrary, Section 101-bb grants "private

actors [New York's liquor wholesalers] 'a degree of private regulatory power,' " that being, to control retail liquor prices in their unfettered discretion. Since the New York statute is a "hybrid" restraint of the kind described by the Court in *Berkeley*, Section 101-bb satisfies the concerted action requirement of Section 1 of the Sherman Act.

The conclusion that the New York retail price maintenance scheme involves a contract, combination or conspiracy in restraint of trade cannot be avoided by pointing to lower court decisions which reject antitrust challenges to state-mandated minimum mark-up statutes. In a true minimum mark-up statute, there is a controlling relationship between the retailers' actual cost of goods sold and the minimum resale price: thus, the wholesaler determines only its own invoice (or actual selling) price and the state commands that its retailer customers not resell at a resale price less than the actual invoice price paid by the retailer plus some minimum mark-up.²³ Since manufacturers or wholesalers have no discretion to fix resale prices under true minimum mark-up statutes, some lower courts have held that such statutes involve restraints that

23 Indeed, in the minimum mark-up statutes upheld by the lower courts, the wholesaler's discretion to set its own price is curtailed in that the state also prohibits the wholesaler from selling at a price below that at which it purchased the liquor in question from the manufacturer plus a minimum mark-up. See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 644 (N.D. Ohio 1982); *George W. Cochran Co. v. Comptroller of Treasury*, 292 Md. 3, 5, 437 A.2d 194, 195 (1981); *Baseline Liquors v. Circle K Corp.*, 630 P.2d 38, 44 (Ct. App. Ariz.), cert. denied, 454 U.S. 969 (1981). New York imposes no similar requirement that a wholesaler's actual selling price bear a direct relationship to the wholesaler's actual costs of goods sold. See pp. 4-6, *supra*.

are imposed directly by the state and therefore do not involve concerted action as required under Section 1 of the Sherman Act.²⁴

New York's retail pricing scheme operates very differently. New York liquor wholesalers can set artificial bottle prices which need bear no relation to the actual (i.e., case) prices charged to retailers. Since the retailer's resale prices under Section 101-bb must be based on the bottle price appearing in the wholesaler's current monthly price schedule notwithstanding that the item being sold at retail was in fact purchased by the retailer at a different price, wholesalers have the power to fix the prices charged by retailers. Indeed, the record in this case demonstrates that wholesalers use as a sales tool their power to manipulate the retail price to guarantee retailers artificially high markups (J.A. 23-27, 32-35; JS App. 100A-101A). Because there is no direct relationship between the retailers' real cost and the minimum resale price, Section 101-bb is not a true minimum mark-up statute like those upheld by the lower courts.

C. It Was Plain Error For The Court Of Appeals To Conclude That Section 101-bb Is Consistent With The National Policy Favoring A Vigorously Competitive Economy Embodied In The Antitrust Laws.

Although it did not expressly consider the unlawfulness of Section 101-bb under the Sherman Act, the Court of Appeals, in applying the *Midcal* balancing test, found the

²⁴ See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); *Little Rock School District v. Borden, Inc.*, 1980-2 Trade Cases (CCH) ¶ 63,493 at 76,618 (E.D. Ark. 1980).

underlying purposes of the two statutes to be consistent. This aspect of the decision below is plain error. Because Section 101-bb authorizes restraints of trade in order to insulate liquor retailers in New York from the rigors of price competition, it flies in the face of the Sherman Act.

The Court has long recognized that the fundamental premise underlying the Sherman Act is that consumer welfare is maximized by the operation of free, unrestricted and vigorous competition. The Court has stated:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition."

National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); accord *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition").

As the Court has recognized, attempting to justify a price restraint by asserting some "potential threat that competition poses to the public . . . is nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers*, 435 U.S. at 695. For this reason, the Court "has never accepted [the] argument" that a "restraint on price competition ultimately inures to the public benefit." *Id.* at 693. To the contrary, the Court has repeatedly held price fixing to be *per se* unlawful regardless of the reasonableness of the prices

established and irrespective of the good motives that led to adoption of the practice. The Court has stated:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940).

This recognition that Congress has placed price-fixing arrangements "beyond the pale" has led the Court to reject all attempts to defend against charges of price fixing on the basis that unrestricted competition will produce anti-competitive results or other socially undesirable effects.

Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here . . . the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Id. at 221.

In finding the purposes of Sections 1 and 101-bb to be consistent, the Court of Appeals accepted the justification of a price fixing arrangement as necessary to avoid a "competitive abuse." Specifically, the court below held that the underlying purpose of Section 101-bb was to insulate small retailers from price competition from larger retailers. It found that lower prices offered by larger retailers—although temporarily beneficial to consumers—ultimately could prove detrimental in that they:

threaten[ed] to drive small retailers out of business and consolidat[e] control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers and market competition generally.

JS App. 15A.

This desire—to preserve through resale price maintenance inefficient competitors whose continued existence was purportedly jeopardized as a result of vigorous price competition—simply cannot be reconciled with the Court's construction of Section 1. As the Court has emphasized, the purpose of the antitrust laws is "the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted; emphasis in original). The Court's rejection in horizontal price fixing cases of defenses based on "competitive abuses" applies with equal force to vertical price fixing—which the Court has held to be *per se* illegal because it destroys horizontal competition no less effectively than horizontal price restraints. See *Midcal*, 445 U.S. at 103 (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. at 408); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 399, 401 (1927). Indeed it was vertical price fixing of precisely the type involved in the case at

bar that this Court found to be a *per se* violation of the Sherman Act in *Midcal*.

Nor can New York's desire to insulate retailers from competition be reconciled with the decision of Congress to repeal the fair trade exemption to the federal antitrust laws and thus deprive the states of the power to defeat application of the *per se* rule against vertical price fixing.²⁵ The strong federal policy against resale price maintenance is unmistakable.²⁶

Rather than being consistent with the policies underlying the federal antitrust laws, New York's concern that price competition in the retail sale of liquor could lead to predatory pricing which in turn would ultimately lead to an oligopolistic retail liquor market is economically irrational.²⁷ Because New York law restricts liquor licensees to the operation of a single retail store which may sell no products other than wine and liquor (ABC Law, § 63 (McKinney 1970 & Supp. 1984-85)), small retailers are not now, and cannot reasonably expect to be, confronted with competition from either large chain stores which can pre-

25 See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (repealing the Miller-Tydings Act, Pub. L. No. 73-314, 50 Stat. 693 (1937)).

26 In repealing the federal fair trade exemption Congress specifically accepted a Library of Congress study's conclusion that small retailers flourished more in free trade than in fair trade states. See S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 1569, 1571 (setting forth study's conclusion).

27 Predatory pricing, of course, is pricing below cost in order to eliminate or discipline competitors and enjoy monopoly or undisturbed profits in the future. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1354-55 & n.8 (1986).

date in some markets by virtue of the higher profits they obtain in other, less competitive markets, or even a single dominant firm capable of predatory pricing.²⁸ In any event, the Court has expressed substantial skepticism as to the likelihood that a successful predatory pricing scheme could occur in a market characterized by a large number of sellers where would-be competitors are readily able to enter the market. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357-59 (1986). It cannot be seriously disputed that New York's concern with predation in the retail sale of liquor is far more dubious than what was at issue in *Matsushita*—an alleged predatory pricing conspiracy among approximately 10 companies. New York's fear that dozens, if not hundreds, of larger liquor retailers would choose to incur substantial losses through selling below cost for a prolonged period makes no sense when barriers to entry into the New York retail liquor business are essentially nonexistent.²⁹

28 Predation in one local market by a large multi-market seller would, if proven, constitute geographic price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). Predation by a single dominant firm, if proven, would make out a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

29 All that is required for entry into the retail liquor business in New York is a commercial lease and a liquor license. With barriers to entry so low, large retailers—if ever successful in driving small retailers out of the market—would, as soon as they attempted to raise their prices to oligopolistic levels, find the market flooded with a stream of new entrants who would drive prices back down. See *Matsushita Electric Industrial Co.*, 106 S. Ct. at 1357-59; *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982-83 (2d Cir. 1984).

Thus, the holding below that price fixing in response to vigorous competition "is consistent with the federal [antitrust] statutes" (JS App. 17A) cannot survive scrutiny. Since Section 101-bb plainly authorizes private vertical price restraints, it unmistakably conflicts with the Sherman Act.

II. Because New York Does Not Actively Supervise Liquor Pricing Under Section 101-bb, The New York Court Of Appeals Correctly Found No "State Action" Antitrust Immunity.

In rejecting New York's claim that Section 101-bb is secured from invalidation by the "state action" doctrine articulated by the Court in *Parker v. Brown*,³⁰ the New York Court of Appeals correctly applied the standards governing "state action" immunity set forth by the Court in *Midcal*.

In *Midcal*, the Court established a two-prong test for antitrust immunity under the state action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted). The Court concluded that the first test was satisfied because the California statute clearly indicated a purpose to permit resale price maintenance (*id.*). The second standard was not met, however, in that "[t]he State simply authorizes price-setting and enforces the prices established by private parties.

³⁰ New York's Attorney General has advanced this argument in the Court even though it was expressly rejected by New York's highest court (JS App. 9A-10A) and despite the fact that the appellee has not asked the Court to review any aspect of the decision below.

The State neither establishes prices nor reviews the reasonableness of the price" established. *Id.* Because "[t]he State does not monitor market conditions or engage in any 'pointed reexamination' of the program," the Court held that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Id.* at 106 (footnote omitted).

For purposes of state action analysis, Section 101-bb is indistinguishable from the California statute, as the Court below found (JS App. 10A). The New York statute meets the first *Midcal* test because it plainly evidences a legislative policy in favor of resale price maintenance (*id.*). But the second test is not satisfied, as the state court observed, because "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (*id.*).

Specifically, New York wholesalers at their discretion can set bottle prices which reflect all, part or none of a reduction in case prices actually paid by retailers. See pp. 6-8, *supra*. Even without manipulating the relationship between case and bottle prices, wholesalers can adjust bottle prices in successive months to guarantee their retailer customers profit margins far in excess of 12 percent. See pp. 8-9, *supra*. In exercising their unfettered discretion to control minimum retail prices, wholesalers are not subject to state supervision or regulation. Under *Midcal*, New York—which does not actively "monitor market conditions or engage in any 'pointed reexamination' of" the prices set by wholesalers—cannot thwart the "national policy favoring competi-

tion" merely by casting this "gauzy cloak of state involvement over" the wholesaler's "price fixing arrangement."³¹

New York cannot find refuge for its resale price maintenance scheme in the Court's decision in *Hoover v. Ronwin*, 466 U.S. 558 (1984). There, the denial of an application for admission to the Arizona bar was challenged as violative of the antitrust laws. Since all decisions whether or not to grant admission to bar candidates ultimately were made by the Arizona Supreme Court, a body possessed of the attributes of state sovereignty, the Court held that the conduct at issue was *per se* entitled to state action immunity without reference to the two-prong *Midcal* test. The Court, however, specifically stated that *Midcal* continues to control antitrust challenges to state statutes which authorize private conduct violative of the antitrust

31 See *Midcal*, 445 U.S. at 106. The New York Court of Appeals correctly distinguished this case from the decision in *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981) (see JS App. 10A), because the true minimum mark-up law (see p. 23, *supra*) upheld in *Morgan*—in contrast to Section 101-bb—provided for direct state supervision of the minimum mark-up to be imposed and left the wholesaler with no discretion in setting the minimum retail price. *Morgan*, 664 F.2d at 355-56 & n.2. For the same reason, this case is distinguishable from other lower court decisions upholding true minimum mark-up statutes under the state action immunity doctrine. Compare *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 646-47 (N.D. Ohio 1982); *Walker v. Bruno's, Inc.*, 650 S.W. 2d 357, 360-66 (Tenn. 1983); *George W. Cochran Co. v. Comptroller of Treasury*, 292 Md. 3, 11, 437 A.2d 194, 198 (1981).

laws. *Id.* at 569.³² Because Section 101-bb involves a "private price-fixing arrangement authorized by [the] State" rather than one in which "the conduct at issue is in fact that of the state legislature or supreme court" (*id.* at 568, 569), the instant case is controlled by *Midcal* rather than *Ronwin*.

III. The Twenty-First Amendment Does Not Immunize Section 101-bb From Invalidity Under The Sherman Act.

Although early cases described the states' powers under the Twenty-first Amendment in expansive terms,³³ in more recent decisions, particularly those in the period following *Joseph E. Seagram and Sons, Inc. v. Hostetter*,³⁴ the Court has engaged in a more particularized inquiry which places a greater emphasis on countervailing federal concerns such as the federal interest in favoring vigorous

32 In its most recent decisions the Court has reaffirmed the applicability of the *Midcal* standard to cases involving private conduct authorized or compelled by a state. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1727 (1985), the Court noted that "[t]he circumstances in which Parker immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in [*Midcal*]." In *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1717 (1985) the Court recognized that even though *Midcal* involved an action against a state agency, it required the same analysis as cases involving state regulation of private anti-competitive acts.

33 See, e.g., *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936).

34 384 U.S. 35, 42 (1966) (where liquor is destined for use, distribution or consumption in New York, "the Twenty-first Amendment demands wide latitude for regulation by the State").

competition. Thus, the Court stated in *Midcal* that cases involving the scope of the Twenty-first Amendment require a "pragmatic effort to harmonize state and federal powers." 445 U.S. at 109.

In *Midcal*, the Court held that when a state liquor statute sanctioning private conduct violative of the federal antitrust laws is defended under § 2 of the Twenty-first Amendment, the competing federal and state interests must be balanced to determine "after careful scrutiny" which interest should prevail.³⁵ In upholding Section 101-bb, the Court of Appeals held that the state's interest in preserving small retailers from the effects of price competition prevailed over the "generalized concerns of the Sherman Antitrust Act" (JS App. 16A). Because the New York court grossly undervalued the federal interest in a competitive economy and substantially overvalued the asserted state interest in preserving small liquor retailers, the decision below is clearly erroneous.

A. The Federal Interest Is Both Specific And Directly Implicated In This Case.

In *Midcal*, the Court made plain that the federal interest in preventing vertical price fixing—and thereby promoting a competitive, efficient economy—is "important", "substantial" and "undoubted." 445 U.S. at 110, 114. The Court also stated as follows:

³⁵ 445 U.S. at 110. Although this case involves a conflict between state liquor laws and a specific federal statute enacted pursuant to the Commerce Clause, the Court has applied the same balancing test to state liquor laws that conflict with the dormant Commerce Clause. E.g., *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332-33. (1964).

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

Id. at 110-11 (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)). This fundamental interest in a competitive economy is directly and substantially contravened by New York's authorization of price restrictions by private parties that are *per se* illegal under the Sherman Act. See pp. 18-30, *supra*. Thus, the court below plainly erred in finding that this case involved only the "generalized concerns of the Sherman Antitrust Act" (JS App. 16A).

B. New York Has Failed To Substantiate Its Claim That Section 101-bb Preserves Small Retailers.

In balancing the strong federal interest in enforcement of the antitrust laws against New York's purported interest in maintaining a system of resale price maintenance, the Court of Appeals accepted New York's claim that Section 101-bb was necessary to sustain small liquor retailers. Since no evidence in the record substantiates this claim, the New York statute cannot survive under *Midcal*.

California had asserted in *Midcal* that its statute compelling wine producers to engage in resale price maintenance was necessary to promote the state's interests in temperance and preserving small retailers. The Court rejected these claims, noting that "[n]othing in the record in this case suggests that the wine pricing system helps sustain small retail establishments," and that the system's

adherents had not "demonstrated that the program inhibits the consumption of alcohol by Californians." 445 U.S. at 113. For these reasons, the Court stated:

We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. *The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.*

Id. at 113-14 (emphasis added). This principle that "unsubstantiated state concerns" do not enjoy "the same stature as the goals of the Sherman Act" applies with equal force in this case.

New York does not, and cannot, assert that Section 101-bb promotes the state interest in inhibiting consumption of alcoholic beverages. Indeed, the Court of Appeals, in its opinion below, noted the finding of the Moreland Commission in 1964 that state laws which establish artificially high prices through vertical price fixing do not promote temperance (JS App. 16A n.2). The Court has relied upon the same study to support the same conclusion. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 39. Thus, the state's interest in temperance is not at issue in this case, and Section 101-bb rises or falls upon the state's proclaimed interest in the preservation of small retail establishments.

As in *Midcal*, there is simply no evidence in the record of this case that Section 101-bb, in the 15 years since its amendment, has operated to assure the economic survival of small liquor retailers. Indeed, the court below made no finding that Section 101-bb effectively serves the pur-

pose of protecting small retailers. The Court of Appeals' conclusion that the instant case is distinguishable from *Midcal* was based solely on the 1971 New York Senate Excise Committee study (see pp. 10-11, *supra*) which stated that, when vigorous competition had prevailed in New York between 1964 and 1971, the existence of small liquor retailers had been threatened (JS App. 14A-15A). Although the Excise Committee, by recommending amendment of the statute in 1971, purportedly acted for the purpose of preserving small retailers, the Committee—prior to the statute's amendment in 1971—obviously could not, and did not, conclude that the amended statute was operating to preserve small retailers.³⁶

The conclusive effect given by the court below to the proclaimed purpose of the New York statute cannot be squared with the *Midcal* substantiation requirement. The Court in *Midcal*, in considering the California resale price maintenance scheme for wine, approved the reasoning of an earlier California Supreme Court decision holding that California had failed to substantiate the claim that its similar pricing statute for liquor was necessary to pre-

³⁶ When the Court has balanced state and federal interests in non-liquor cases involving challenges to state laws under the dormant Commerce Clause, it has been unwilling to accord substantial weight to asserted—and undeniably vital—state interests in safety and health if those assertions are supported solely by statements of legislative purpose. Instead, the Court has required a showing that the challenged state statute has had the effect of serving the asserted state interest. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670, 671 (1981) (plurality opinion); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-44 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-81 (1945). In light of *Midcal* there is no basis to require less in the present context.

serve small retailers from predatory pricing. 445 U.S. at 111-13 (citing *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978)). Both the Court in *Midcal* and the California Supreme Court in *Rice*—in the absence of direct proof that resale price maintenance was preserving small liquor retail establishments—accepted the validity of a Library of Congress study made at the time of repeal of the federal fair trade exemption³⁷ which concluded that generally the number and growth of small retailers were greater in states that allowed free trade than in those which sanctioned vertical price fixing.³⁸

The court below sought to distinguish *Midcal* and *Rice* on the ground that the New York Legislature had responded to the perceived state interest in preserving small retailers after the New York Senate Excise Committee's report whereas the California Legislature had made no such finding (JS App. 15A). Surely, this is a distinction without a difference. See p. 37 & n.36, *supra*. The decision below is totally devoid of any evidence or rationale to support the view that the New York retail liquor business is so unusual that retail price maintenance should be conclusively presumed to be necessary to serve that state's interest in protecting small retailers, when similarly

37 Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (repealing the Miller-Tydings Act, Pub. L. No. 73-314, 50 Stat. 693 (1937)).

38 *Midcal*, 445 U.S. at 112-13, and *Rice*, 21 Cal. 3d at 445-46, 579 P.2d at 493-94, 146 Cal. Rptr. at 595 (both citing S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 1569, 1571 (where the study's conclusion is set forth; in repealing the federal fair trade exemption, Congress also accepted this conclusion)).

unsubstantiated claims were rejected in *Midcal* and *Rice*, and when Congress concluded that vertical price fixing generally does not work to preserve small retail establishments.³⁹ Since available public data indicates that the number of retail liquor stores in New York has in fact continued to decline since the 1971 amendment of Section 101-bb (JS App. 99A), the court below clearly erred in concluding that the New York statute served the state interest in preserving small retailers.

C. Any State Interest In Protecting Small Retailers From Predatory Pricing Could Be Amply Served By Less Anti-Competitive Alternatives.

The court below upheld Section 101-bb as necessary to preserve small retailers from "the predatory pricing practices of large discount dealers" including "the continued employment of 'lossleader' selling" (JS App. 14A). But the court below ignored the fact that this state interest could easily have been better served by any of a number of more narrowly drafted statutes that did not sanction *per se* violations of the Sherman Act.

The Senate Excise Committee Report is replete with statements of alarm about the prevalence of below-cost sales by certain New York retailers.⁴⁰ To a substantial extent, however, the perceived problem was caused by an interpretation of the 1964 version of Section 101-bb pegging "cost" to the lowest wholesale price posted by *any* wholesaler in the state, and not to the wholesale price of the

39 See pp. 28, 38 & nn. 26, 38, *supra*.

40 The economic rationality of New York's concern is subject to serious question. See pp. 28-29, *supra*.

vendor from whom the retailer had in fact purchased the item in question. By amending Section 101-bb in 1971 to mandate that "cost" be derived with reference to the price listed in the "applicable schedule filed . . . by [the] wholesaler from whom the retailer purchases liquor" (see p. 11, *supra*), New York took a substantial step toward eliminating a retailer's ability to lawfully sell liquor at prices below its actual invoice cost. By also defining "cost" with reference to a bottle price that need bear no relation to the retailer's actual cost of goods sold (see pp. 8, 11 & n.6, *supra*), Section 101-bb not only seeks to preclude sales below actual cost, but also renders illegal sales that are substantially profit making. See pp. 11-12, *supra*.

In thus authorizing wholesalers to engage in resale price maintenance, New York ignored any number of less anti-competitive alternatives. New York could easily have adopted a statute of general application barring below cost sales while defining "cost" in terms of actual cost.⁴¹ Likewise, New York could have enacted a statute expressly prohibiting all retailers—or, alternatively, all retail liquor stores—from engaging in unfair business practices such as lossleader selling or other types of predatory pricing.⁴²

41 Over 30 states have enacted statutes which seek to prohibit below-cost sales. These statutes are compiled in 1A R. Callman, *The Law of Unfair Competition, Trademarks and Monopolies* § 7.02 at n.9 (4th ed 1981). "Cost" is usually defined as "invoice" or "replacement" cost. *Id.*, § 7.13 at 31. New York has no such statute of general application. *Id.*, § 7.02 at n.12.

42 The California Supreme Court in *Rice* noted that California had enacted an unfair business practice statute of general application. 21 Cal. 3d at 457 n.24, 579 P.2d at 493 n.24, 146 Cal. Rptr. 602 n.24. New York has no such statute. 1A R. Callman, § 7.02 at n.9. At least four states—Arkansas, Colorado, New Mexico and Pennsylvania—have enacted statutes which seek to prohibit liquor retailers from selling below cost. 1A R. Callman, § 7.02 nn.10 & 11. New York has no such statute. *Id.* at n.12.

Any of these possible courses would have eliminated predatory pricing practices and lossleader selling by liquor retailers without undercutting the federal policy of fostering a competitive economy.

The lower courts, in applying the *Midcal* balancing test, have invalidated state laws when the asserted state interests could be served by alternatives less offensive to the federal interests at issue.⁴³ Indeed, both the lower court in *Midcal* and the California Supreme Court in *Rice* had struck down state statutes under the federal antitrust laws notwithstanding the Twenty-first Amendment in light of the existence of less anti-competitive alternatives.⁴⁴ In *Midcal*, by affirming the lower court's judgment and expressly approving the reasoning of the California Supreme Court in *Rice*, the Court unmistakably demonstrated that when federal and state interests are balanced under the Twenty-first Amendment, the federal interest in favoring a vigorously competitive economy must prevail over state interests that can adequately be served by less anti-com-

43 *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 136 Cal. App. 3d 829, 839, 186 Cal. Rptr. 552, 559-60 (1982), cert. denied, 464 U.S. 863 (1983) (California price posting statute violates Sherman Act and is not insulated by Twenty-first Amendment); *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850, 863 (S.D.N.Y.), *aff'd*, 761 F.2d 140 (2d Cir. 1985) (New York statute permitting sales in retail grocery stores of wine products containing only New York grown grapes held violative of the dormant Commerce Clause and not saved by the Twenty-first Amendment).

44 *Rice*, 21 Cal. 3d at 457 n.24, 458, 579 P.2d at 493 n.24, 494, 146 Cal. Rptr. 602 n.24, 603; *Midcal Aluminum, Inc. v. Rice*, 90 Cal. App. 3d 979, 984, 153 Cal. Rptr. 757, 760-61 (1979), *aff'd*, 445 U.S. 97 (1980); accord *United States Brewers Ass'n v. Healy*, 464 U.S. 909 (1983) (mem.), *aff'g* 692 F.2d 275, 283-84 (2d Cir. 1982) (state liquor price affirmation statute struck down under the dormant Commerce Clause notwithstanding the Twenty-first Amendment).

petitive alternatives.⁴⁵ Because the New York statute needlessly offends the Sherman Act, the Court of Appeals erred in concluding that Section 101-bb was saved by the Twenty-first Amendment even assuming *arguendo* that the statute preserves small retailers from predatory pricing practices.

D. Protecting Small Retailers From The Effects Of Non-Predatory Price Competition Is Not At The Core Of The Twenty-First Amendment.

If New York had been able to demonstrate that resale price maintenance had the effect of preserving small retailers whose existence was imperiled by the effects of vigorous (but non-predatory) price competition, this case would have raised an issue that the Court expressly left unresolved in *Midcal*, namely, whether the state interest in preserving small retailers is so central to the core concerns of the Twenty-first Amendment that it outweighs the fundamental federal interest in a competitive economy. 445 U.S. at 113-14. The court below, in holding that the state interest prevailed, ignored post-*Midcal* Court precedents which require a contrary result.

⁴⁵ Similarly, the Court, in cases not involving alcoholic beverages, has consistently invalidated state laws that offend the negative implications of the Commerce Clause when there are alternatives available that serve the asserted state interests but are less discriminatory against, or impose less substantial burdens on, interstate commerce. See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373, 376-77 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935).

As previously noted (at p. 36), New York's interest in temperance is not implicated in this case. Neither the Court of Appeals nor the appellee has advanced temperance or prevention of alcohol abuse in defense of Section 101-bb. See pp. 10-11, 14-15, 36, *supra*. Indeed, New York's justification for Section 101-bb—maintaining a larger number of retail liquor stores—logically would be expected to make liquor more readily available to the consuming public, not less so. In any event, the court below in finding Section 101-bb consistent with the policies underlying the federal antitrust laws, held that the state statute was designed to serve the ultimate purpose of preventing an oligopolistic retail liquor market and the high prices that would exist in such a market (JS App. 17A). Thus, any claim that Section 101-bb promotes through higher retail prices New York's interest in inhibiting liquor consumption within its borders cannot prevail in this case.

New York's assertion that Section 101-bb serves the state's interest in maintaining small retail liquor establishments must be adjudged under Court precedents since *Midcal*. These decisions establish that when a state liquor statute conflicts with a federal statute adopted pursuant to congressional power to regulate interstate commerce, the state interests "implicated" by the state statute must be "so closely related to the powers reserved by the Twenty-first Amendment that the [state statute] may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); accord *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984) (same standard applies when balancing interests under the dormant Commerce Clause and the Twenty-first Amendment).

In *Capital Cities*, the Court rejected a claim that a state statute barring the transmission by cable television stations of wine advertisements generated by out-of-state broadcasters sufficiently implicated the state's interest in promoting temperance to override the federal interest in a uniform, national communications policy. Because the prohibition applied only to wine advertisements originating outside the state and transmitted on cable television while permitting advertisements for other alcoholic beverages in all media, the Court found that the state interest in temperance was not as substantial as would have been the case had the state sought to promote that interest less selectively. *Id.* at 715.

In light of decisions of the Court of Appeals below and in an earlier case, New York is similarly pursuing its asserted state interest selectively. While the New York court considered the preservation of small retailers to be so substantial as to justify Section 101-bb (JS App. 17A), it had previously concluded that the same state interest was insufficient to uphold a New York statute that authorized wholesalers to fix minimum retail prices of wine even though wine sales are a large portion of a retail liquor store's business (JS App. 16A-17A).⁴⁶ Under *Capital Cities*, this less than across-the-board pursuit of a state interest cannot override the strong federal interest involved in this case.

It cannot reasonably be argued that a state statute which seeks to protect liquor retailers from vigorous (non-

⁴⁶ See *William J. Mezzetti Associates, Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791, 432 N.Y.S.2d 372 (1980).

predatory) competition by authorizing wholesalers to engage in *per se* violations of the Sherman Act implicates concerns at the core of the Twenty-first Amendment. Indeed, the contention that a state statute sanctioning economic protectionism of any sort is at the heart of the Twenty-first Amendment cannot survive the Court's decision in *Bacchus Imports*. There, the Court struck down under the dormant Commerce Clause a state statute which had the effect of favoring in-state brandy producers over out-of-state competitors. The Court held that a state's interest in developing a vigorous local liquor industry constituted "mere economic protectionism" that was "not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor"; "[t]he central purpose of the [Twenty-first Amendment] was not to empower states to favor local liquor industries by erecting barriers to competition"; and therefore, Hawaii's discriminatory tax was not so closely related to "the principles underlying the Twenty-first Amendment" to find insulation thereunder. *Id.* at 3058. Where a state statute violates a "central tenet of the Commerce Clause" and is "not supported by a clear concern of the Twenty-first Amendment," the Court held that the state statute must fall. *Id.* at 3059.

The reasoning of *Bacchus Imports* requires invalidation of Section 101-bb.⁴⁷ Just as antipathy to local pro-

⁴⁷ See n.35. If anything, the federal interest at issue in *Bacchus Imports*, where Congress had not acted and the state statute was found to contravene the dormant Commerce Clause, is less weighty than in this case, where Congress has enacted legislation that is directly contravened by the New

(Continued on following page)

tectionism is basic to the dormant Commerce Clause, hostility to price restrictions is a "central tenet" of the Sherman Act. Moreover, preserving small retailers by "erecting barriers to competition" from larger rivals is a form of "mere economic protectionism" that is no more "a clear concern of the Twenty-first Amendment" than is protecting in-state liquor producers from out-of-state competition.⁴⁸

York statute. See *Bacchus Imports*, 104 S. Ct. at 3060, 3063 (Stevens, J. dissenting). Indeed, the federal interest is particularly weighty here since, as the Court has repeatedly recognized, Congress, in enacting the Sherman Act, exercised to the full extent its Commerce Clause power. E.g., *United States v. American Building Maintenance Industries*, 422 U.S. 271, 278 (1975); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945) (holding that Congress could, consistent with the Commerce Clause, outlaw a vertical price fixing conspiracy among liquor manufacturers, wholesalers and retailers); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

48 Cf. *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y.), *aff'd*, 761 F.2d 140, 141 (2d Cir. 1985) (invalidating a New York statute permitting the sale of only those "wine coolers" containing New York grown grapes; "the powers reserved" to the states under the Twenty-first Amendment "must be exercised with temperance as their goal"); *Business Title Corp. v. Division of Labor Law Enforcement*, 17 Cal. 3d 878, 884 n.7, 132 Cal. Rptr. 454, 458 n.7, 553 P.2d 614, 618 n.7 (1976) (claim that state law, rather than federal law, governed a clash of tax liens when one was a federal tax lien rejected: the state statute "merely provides a scheme of priorities among private creditors of liquor licensees that in no way relates to the state's interest in regulating the consumption and distribution of alcohol").

Conclusion

For the reasons set forth above, the decision below should be reversed with directions to grant Appellant's petition and annul the SLA's Order of Suspension dated November 12, 1982.

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APPELLEE'S

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

Supreme Court, U.S.

FILED

JOSEPH F. SPANGL, JR.
CLERK

324 LIQUOR CORP.,
d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

— against —

THOMAS DUFFY, ANNE GLADWIN,
ROBERT DOYLE, TERRENCE R. FLYNN
and FREDERICK FANNOZZO,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Does a New York statute, which unilaterally imposes a 12% minimum markup above cost on retail liquor prices, on its face mandate, authorize, or irresistibly compel a private price-fixing conspiracy which violates the Sherman Act?

2. Does a New York regulation which permits a wholesaler to determine only a component of the retail liquor price, on its face mandate, authorize, or irresistibly compel a private price-fixing conspiracy which violates the Sherman Act?

3. Is the unilateral imposition of a 12% minimum markup above cost on retail liquor prices by the New York Legislature immune from antitrust challenge as state action?

4. Does New York's exercise of its core powers under the twenty-first amendment to promote temperance and to structure a wholly intrastate liquor distribution system overcome any countervailing federal interest under the antitrust laws?

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The regulatory scheme at issue consists of two sections of the New York Alcoholic Beverage Control Law ("ABC Law"), §§ 101-b and 101-bb (McKinney 1970 & Supp. 1986), and two regulations promulgated pursuant to § 101-b, Rule 16.4(e), N.Y. Admin. Code tit. 9, § 65.4(e) (1980) (the "Rule"), and Bulletin 471 (Series 1973) (the "Bulletin"). J.A. 7-11.¹ Appellant has expressly abandoned its challenge in this Court to 101-b.² It has also abandoned its Sherman Act challenge to Rule 16.4(e).³

Appellant does advance a facial attack on § 101-bb, as construed in Rule 16.4(e) by the New York State Liquor Authority ("SLA"), the agency charged with administering the ABC Law, and challenges to § 101-bb "as applied." The latter challenge is limited to an attack on the anticompetitive effect of Bulletin 471, promulgated pursuant to § 101-b, not § 101-bb. Since the Bulletin (which exempts temporary sales from the normal operation of § 101-bb and the Rule) and § 101-bb are entirely separate and present different issues under the antitrust laws and the twenty-first amendment, they are analyzed independently below.

1. *The statute challenged on its face and related statutes*

Section 101-bb is part of New York's comprehensive statutory scheme regulating liquor prices at each level of distribution.⁴ At

¹ References to pages in the joint appendix are indicated as J.A. -. References to pages in the appellant's brief on the merits are indicated as App. Br. -. Pages in the jurisdictional statement and its appendix are indicated as J.S. -.

² In its jurisdictional statement, the appellant declared: "The constitutionality of the price posting provisions relating to liquor wholesalers is not at issue here." J.S. 4 n.2. In addition, it identifies as challenged provisions only § 101-bb and Bulletin 471. App. Br. 6-9; J.S. 4-7.

³ See preceeding footnote.

⁴ In addition to these price restrictions, the state strictly regulates all other aspects of the liquor distribution system. *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*, 64 N.Y.2d 504, 521-22, 479 N.E.2d 779, 789, 490 N.Y.S.2d 143, 153 (1985), J.S. 17A.

the first level of distribution, New York prohibits a manufacturer from selling to a wholesaler unless it has filed a price schedule which is then in effect. ABC Law § 101-b(3)(a) (McKinney 1970).⁵ The manufacturer must sell at the case and bottle price listed in the schedule,⁶ unless the SLA grants written permission to sell at a different price for good cause. ABC Law § 101-b(3)(a).

New York requires the wholesaler (or manufacturer selling directly to a retailer) to file a monthly price schedule for each brand of liquor it sells. ABC Law § 101-b(3)(b). In 1967, the Legislature froze the wholesaler's maximum markup on the manufacturer's price to it on each item at the percentage markup for the month immediately preceding the effective date of ABC Law § 101-b(3)(d). Thereafter, no matter how long the wholesaler sells that item, the statute restricts the wholesaler's ability to change its price to the retailer. It is only when a new wholesaler or a new product enters the market that a wholesaler is free to set the initial price for an item. Again, the wholesaler is thereafter restricted in the same way. The wholesaler must sell to the retailer at the case and bottle price then in effect,⁷ unless the SLA gives prior written permission for good cause. *Id.*

⁵ For the past two decades, New York also restricted the ability of the manufacturer to set its own prices by requiring it to affirm that the prices listed in the schedule were no higher than the highest price at which the manufacturer would sell the item of liquor to a wholesaler in any other state. ABC Law § 101-b(3). On June 3, 1986, this Court declared the affirmation requirement violated the commerce clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 54 U.S.L.W. 4567, 4570 (U.S. June 3, 1986).

⁶ The case price may include limited trade discounts not exceeding 2% for volume and 1% for payment within ten days. ABC Law § 101-b(2)(b). The appellant does not challenge the statutory trade discounts in the case price, which are not reflected in the bottle price. ABC Law § 101-bb(2).

⁷ The wholesaler's case price may include limited trade discounts not exceeding 3%. See preceding footnote.

Although the statute on its face does not expressly link the posted case and bottle price,⁸ under Rule 16.4(e)⁹ the SLA requires that these posted prices be the same except for surcharge for handling (breaking open a case to sell by the individual bottle).¹⁰ The court below reinstated the judgment of the New York Supreme Court that the SLA had authority under state law to promulgate Rule 16.4(e). *J.A.J. Liquor Store*, 64 N.Y.2d at 523, 479 N.E.2d at 790, 490 N.Y.S.2d at 154, J.S. 19A; 324 *Liquor Corp. v. McLaughlin*, 119 Misc. 2d 746, 748, 464 N.Y.S.2d 355, 357 (Sup. Ct. N.Y. Co. 1983), J.S. 41A.

Section 101-b and Rule 16.4(e) together severely limit the ability of the wholesaler to change its price to the retailer. Whenever the manufacturer reduces its case or bottle price listed in the price schedule required by § 101-b(3)(a), the wholesaler must reduce its case or bottle price to the retailer by a like percentage. ABC Law § 101-b(3)(b). The statute expressly permits the wholesaler to reduce its case or bottle price to the retailer only in two other circumstances: (1) it may offer small trade discounts, ABC Law § 101-b(2)(a), and (2) it may reduce its case or bottle price to the retailer to meet, but not exceed, a similar price reduction for the same brand by another wholesaler. ABC Law § 101-b(4).

⁸ The posted price is sometimes referred to as the "legal" price to distinguish it from the "post-off" or sale price under the Bulletin.

⁹ Rule 16.4(e) provides:

For each item of liquor listed in the schedule of liquor prices to retailer there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority.

¹⁰ In 1973, the SLA, pursuant to § 101-b, promulgated Bulletin 471 which modifies the normal operation of Rule 16.4(e) by authorizing wholesalers to post-off (reduce) the case price to conduct temporary sales. This Bulletin is discussed below.

Correspondingly, the Legislature permits the wholesaler to increase its prices in only two situations. First, whenever the manufacturer increases its case or bottle price, the wholesaler may not increase its case or bottle price by more than a like percentage. ABC Law § 101-b(3)(b). Second, whenever the wholesaler wishes to increase its case or bottle price to reflect increased labor or operating costs, it must obtain written permission from the SLA, which will be granted only for good cause. *Id.*¹¹

Under the minimum markup provision in § 101-bb, the retailer may not sell to its customers at less than cost. That provision defines "cost" as

the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor.

ABC Law § 101-bb(2). It defines "price" as

the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred one-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor; except that where no applicable schedule is in effect the bottle price of the item of liquor shall be computed as the appropriate fraction of the case price of such item, before any discounts, most recently invoiced to the retailer.

Id.

¹¹ A wholesaler may increase or decrease the price to the retailer to reflect any changes in or new taxes or fees applicable to liquor without such permission. ABC Law § 101-b(3)(b).

Thus, the statute, together with Rule 16.4(e), imposes a simple, standard minimum markup of 12% on the replacement cost¹² to the retailer.¹³

2. The statute "as applied" in Bulletin 471

Appellant and the Solicitor General attack § 101-bb(2) "as applied" by challenging Bulletin 471, which exempts temporary sales (post-offs) from the normal requirements of Rule 16.4(e). Virtually ignoring § 101-bb, the primary focus of their arguments is on the anticompetitive effects of the Bulletin. The Bulletin,

¹² By defining "price" as the bottle price then in effect (which is essentially the same under the Rule as the case price), the Legislature adopted replacement cost rather than actual invoice cost as the base for the markup.

¹³ Under Rule 16.4(e), a wholesaler cannot increase the differential between the case price and the bottle price except for the statutory maximum reduction of 3% for trade discounts.

The following example illustrates how § 101-bb and Rule 16.4(e) operate in the absence of the temporary sale exception to the Rule in Bulletin 471. In October, a manufacturer sells a brand of vodka in New York at \$8. A wholesaler makes an initial purchase of this brand and posts a schedule with a case price of \$120.00 (\$10 per bottle × 12 bottles per case). Under Rule 16.4(e), it must add a breakage charge to establish an individual bottle price of \$10.16 (\$120.00 case price + \$1.92 breakage charge = \$121.92 divided by 12 bottles per case = \$10.16). It *may not reduce* its case price by more than 3% for trade discounts, i.e., lower than \$116.40 (\$9.70 per bottle). A retailer *must* add at least 12% to the legal bottle price of \$10.16 (which cannot reflect any trade discounts in the case price) and sell at a minimum price of \$11.37.

In November, the manufacturer's price drops 10% to \$7.20. The wholesaler then *must reduce* its case price by an equivalent percentage to \$108.00 (120.00 × .90 = \$108 or \$9.00 per bottle). The wholesaler must also reduce its bottle price by a corresponding amount to \$9.16 (\$108.00 × \$1.92 = \$109.92 divided by 12 = \$9.16). If, on the other hand, the manufacturer's price had increased 10%, the wholesaler would *not* have been able to increase its case price by more than a like percentage or to a maximum of \$132.00 (120.00 × 1.1 = \$132.00). The bottle price would have to follow to \$11.16 (\$132.00 + 1.92 = \$133.92 divided by 12 = \$11.16).

adopted in 1973, two years after the enactment of § 101-bb(2), authorizes a wholesaler to reduce its legal case price to the retailer in a temporary sale without necessarily authorizing the retailer to reduce its bottle price correspondingly.¹⁶ The SLA requires the wholesaler to set the post-off bottle price, which forms the base for the statutory minimum markup, within a certain range. The wholesaler may leave the post-off bottle price at the legal bottle price level, reduce it to conform to the post-off case price, or adopt a bottle price somewhere between the two. Thus, the wholesaler during a sale is permitted to determine a component of the retail price, but not the entire price.

3. *The legislative history of New York's minimum markup statute*

The court below found that the Legislature adopted the 12% minimum markup in 1971 to protect small retailers. *J.A.J. Liquor Store*, 64 N.Y.2d at 519, 479 N.E.2d at 787, 490 N.Y.S.2d at 151, J.S. 15A. In 1964, the Legislature had abolished its fair trade law in response to a series of recommendations by a state investigatory commission. New York State Moreland Commission on the Alcoholic Beverage Control Law, Reports and Recommendations (1964) ("Moreland Commission"). In its place, it enacted the predecessor of the current version of § 101-bb to "eliminate retail sales of liquor at less than cost." Act of April 16, 1964, ch. 531, § 1, 1964 N.Y. Laws 801, 809, *amended by* Act of May 3, 1971, ch. 191, 1971 N.Y. Laws 284.

In 1971, after seven years of experimenting with an inadequate below cost law, it became apparent to both the Governor and the Legislature that an "amendment was needed to protect small retailers because hundreds of package stores were being forced out of business by the predatory pricing practices of large discount dealers." *J.A.J. Liquor Store*, 64 N.Y.2d at 519, 479 N.E.2d

¹⁶ The temporary sale provisions operate in a similar way to the trade discounts mentioned in the statute. The retailer may not reduce its markup to reflect the trade discounts. ABC Law § 101-bb(2).

at 787, 490 N.Y.S.2d at 151, J.S. 14A.¹⁸ The Legislature relied on an extensive study and report on the subject prepared by the Senate Excise Committee at the direction of the Governor. Senate Excise Comm., Final Report of Senate Excise Comm. (1971) ("Final Report").

The Excise Committee, after conducting hearings, reviewed the experience since repeal of the fair trade law and found that "[t]he degree of competition which now prevails in the retailing of liquor is not 'normal' competition," but "competition that is unduly destructive of small stores," Final Report at 36. The Committee noted that this destructive competition "is accompanied by a seemingly monopolistic concentration of volume in the hands of a relatively few stores." *Id.*

Ample evidence supported these conclusions. Package stores were failing at an accelerating rate.¹⁹ *Id.* at 13. *See also id.* at 18-22, 26-27 (discussing destructive competition). The information submitted to the Committee demonstrated that between 1963 and 1969 there was "an accelerating concentration of volume in the hands of a relatively few stores." *Id.* at 12.¹⁷

The Committee also received evidence demonstrating that the decline in prices under former § 101-bb tended "to be promotive of the consumption of distilled spirits," *id.* at 16, and that this

¹⁸ The primary advocates of the 1971 amendment were small liquor retailers, not liquor wholesalers. *See* Letter of State Restaurant Liquor Dealers Association of New York, Inc., in bill jacket, ch. 191, 1971 N.Y. Laws 284; Final Report at 2; Memorandum of Metropolitan Package Stores, 1971 N.Y. Legis. Ann. 80.

¹⁹ 199 package stores discontinued business in 1968, 242 closed down in 1969, and 233 had gone out of business before the end of the year in 1970. Final Report at 13.

¹⁷ In 1963, sales by large package stores (those doing more than \$500,000) amounted to 7.5% of the total volume. By 1969, those stores, amounting to only 3.7% of the 5,257 package stores then licensed, did 25% of the total volume. Trade estimates indicated that their share had risen to 33 1/3% by 1970. Final Report at 12. The rate of concentration in profits was even more rapid than concentration in volume. By 1968, 3.2% of the package stores accounted for 24% of all package store profits. On the other hand, more than half (50.2%) of all package stores earned less than \$6,000 and 11.6% incurred losses. *Id.* at 13.

increase was accompanied by an increase in alcoholism and its associated problems. *Id.* at 35; *See also id.* at 14-15. This evidence led the Committee to reject the Moreland Commission's conclusions that increasing prices had no significant effect on consumption. *See* Moreland Commission, Report and Recommendations No. 3, Mandatory Resale Price Maintenance, at 11-14, 17-23, 30 (Jan. 21, 1964); Study Paper No. 5, Resale Price Maintenance in the Liquor Industry, at 54 (Oct. 28, 1963). The Committee noted that the increase in consumption was a product of several causes and did not determine what portion of the increase was caused by decreasing prices, Final Report at 14, but did find that the decrease "undoubtedly ha[d] made some contribution to a rise in per capita consumption in this State since 1964." *Id.* at 35.¹⁸

The Committee concluded that:

Since it seems patent that the mass of small retailers are unable to compete with the large volume outlets that have emerged, most appear doomed barring the adoption of some formula that will permit the co-existence of both types of outlets. This leaves New York's consumers facing the future prospect of being relatively poorly served only by mass merchandisers.

Final Report at 30. The Committee was concerned that the relatively few remaining outlets could then dictate prices to the injury of consumers and competition generally, *J.A.J. Liquor Store*, 64 N.Y.2d at 520, 479 N.E.2d at 788, 490 N.Y.S.2d at 152, J.S. 15A, and would face little competition from newly established retailers because of high entry costs. Final Report at 30.

The Legislature responded to the concerns expressed in the Final Report by enacting the current version of § 101-bb(2) imposing a minimum markup above cost of 12% which it found to be the average minimum necessary retail overhead. Ch. 191, § 2, 1971 N.Y. Laws 284.

¹⁸ Appellees are unaware of any reputable study since 1964 which is inconsistent with this conclusion. Indeed, far more sophisticated studies than those examined by the Moreland Commission have demonstrated a significant correlation between price and consumption. *See* Point III. B. below, at 39-42.

SUMMARY OF ARGUMENT

The New York Legislature enacted the minimum markup statute, § 101-bb of the Alcohol Beverage Control Law, in direct response to destructive competition in New York's retail liquor industry and the dramatic increase in liquor consumption in the state which followed repeal of resale price maintenance in 1964. States "have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (footnote omitted). Section § 101-bb, which displaces competition in the New York retail liquor industry, is well within the traditional sphere permitted to states to correct imperfections in their local free markets. *Fisher v. City of Berkeley, California*, 106 S. Ct. 1045, 1048 (1986) (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)).

Section 101-bb unilaterally imposes a 12% minimum markup above replacement cost on the liquor retailer. Under settled principles of antitrust law, this unilaterally imposed markup lacks the element of concerted action needed to characterize it as a *per se* violation of § 1 of the Sherman Act. *Fisher*, 106 S.Ct. at 1051. Furthermore, "a 'state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect.'" *Fisher*, 106 S.Ct. at 1048 (citing *Norman Williams*, 458 U.S. at 659). Section 101-bb does not mandate or authorize "conduct which necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate antitrust laws in order to comply with the statute." *Norman Williams*, 458 U.S. at 661.

Section 101-bb is not an illegal hybrid restraint like those in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), because New York, not private parties, sets the markup and New York, not private parties, enforces it. Indeed, § 101-bb operates just like other minimum markup statutes which courts routinely find consistent with the Sherman Act. Moreover, appellant's "as applied" challenge to § 101-bb, which is limited to the anticompetitive effects of Bulletin

471 (providing a temporary sale exemption from the normal workings of § 101-bb and Rule 16.4(e)), also fails because there is no agreement under the unilaterally imposed Bulletin.

The 12% minimum markup above retail cost is immune under the state action doctrine because the New York Legislature enacted § 101-bb as sovereign and as part of a clearly articulated and affirmatively expressed policy to displace competition. *Midcal*, 445 U.S. at 105. Since it acted as sovereign, it need only meet this first prong of the *Midcal* test. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). Moreover, the statute is not simply a "gauzy cloak" over essentially private activity, *Midcal*, 445 U.S. at 106, because the state plays a role in setting prices and it alone enforces those prices. The Bulletin satisfies the first prong because it implements this state policy and the second since the state actively supervises implementation of the Bulletin.

Finally, the twenty-first amendment affords New York wide latitude to promote temperance and structure its local liquor distribution system. New York has a far stronger interest than California did in *Midcal*. Moreover, the Legislature intended § 101-bb to promote temperance by increasing prices to reduce consumption and to protect small retail liquor dealers from destructive competition.

ARGUMENT

I. ON ITS FACE, NEW YORK'S MINIMUM MARK-UP STATUTE DOES NOT MANDATE, AUTHORIZE, OR IRRESISTIBLY COMPEL A PRIVATE PRICE-FIXING CONSPIRACY WHICH VIOLATES THE SHERMAN ACT

New York's minimum markup statute, which prohibits sales below cost, reflects the state's considered response to the effects of destructive competition in its retail liquor industry. The challenged statute, implemented by Rule 16.4(e), is part of a scheme designed to displace competition at all three distribution levels in the liquor industry. Section 101-bb(2) operates directly on liquor retailers by unilaterally requiring them to impose

a 12% minimum markup above cost. As demonstrated below, not only is its enactment within the state's traditional sphere of legitimate economic regulation, but on its face it does not mandate, authorize, or irresistibly compel a private price-fixing conspiracy. Indeed, it is consistent with the purposes of the antitrust laws.

As this Court reiterated only last February, under our federal system, "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims." *Fisher v. City of Berkley, California*, 106 S. Ct. 1045, 1048 (1986) (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)). In addressing the social and economic problems arising from imperfections in the market, states should be free to serve as laboratories for "novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).²⁰ Thus, "the Sherman Act was not intended to prohibit States from imposing restraints on competition." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1726 (1985) (citing *Parker v. Brown*, 317 U.S. 341 (1943)).²¹

²⁰ The Justices of this Court have repeatedly recognized in a variety of contexts "that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (footnote omitted). See also *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1015 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be."); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (opinion of O'Connor, J.); *Community Communications Co. v. City of Boulder, Colorado*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting) ("If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act a municipality's power to regulate the economy would be all but destroyed"); *Chandler v. Florida*, 449 U.S. 560, 579 (1981).

²¹ Under our federal system, states retain broad power to enact regulate prices or fix rents, *Fisher*; milk prices, *Nebbia v. New York*, 291 U.S. 502 (1934); charges of "ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers,"

(footnote continued)

Every member of this Court has agreed "that a 'state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect.'" *Fisher*, 106 S. Ct. at 1048 (quoting *Norman Williams*, 458 U.S. at 659). See also *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978); *Id.* at 116 (Stevens, J., dissenting); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978). In *Exxon*, this Court declared that even though a Maryland statute had an anticompetitive effect, and, thus, was in conflict with the central policy of the Sherman Act,

this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.

437 U.S. at 133 (footnote omitted).²² A basic principle in any preemption analysis is that "[i]t will not be presumed that a

Munn v. Illinois, 94 U.S. 113, 125 (1876); rates charged by harbor pilots, *Olsen v. Smith*, 195 U.S. 332 (1904); state agricultural price supports, *Parker v. Brown*; below cost and loss leader laws, *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334 (1959); and minimum markup laws, *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir.) (Kaufman, J.), *aff'g. Serlin Wine & Spirits Merchants, Inc.*, 512 F. Supp. 936 (D. Conn. 1981). None of these laws violates the Sherman Act.

The challenged statutory provision, ABC Law § 101-bb(2), is just such a permissible regulation, enacted to remedy what the New York Legislature found to be a severe threat to "the survival of the entire retail economy of the liquor industry," *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*, 64 N.Y.2d at 520, 479 N.E.2d at 788, 490 N.Y.S.2d at 152 (1985) (citing Final Report 29-30), J.S. 14A-15A, and to promote temperance. ABC Law § 101-bb(1).

²² In any event, any conflict with the pro-competitive policy of the Sherman Act here is lessened because the minimum markup law advances the equally important Sherman Act goal of protecting small retailers from destructive competition. Congress intended the Sherman Act to advance two overlapping and

(footnote continued)

federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so," and, therefore, the "exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952). This Court reiterated in *Exxon* that it was "generally reluctant to infer preemption." 437 U.S. at 132.

Therefore, when a statute is challenged under the antitrust laws on its face, this Court will strike it down "on pre-emption grounds only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate antitrust laws in order to comply with the statute." *Fisher*, 106 S. Ct. at 1048 (quoting *Norman Williams*, 458 U.S. at 661). As this Court explained in *Norman Williams*,

sometimes mutually inconsistent goals — preservation of competition and preservation of small competitors. *United States v. Von's Grocery Company*, 384 U.S. 270, 274 (1966); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (L. Hand, J.) ("[Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.").

Because the Sherman Act failed adequately "to protect the smaller businessmen from elimination through the monopolistic pressures of large combination," *Von's Grocery*, 384 U.S. at 274-75, Congress enacted § 7 of the Clayton Act in 1914 and the 1950 Celler-Kefauver Act. *Id.* at 275-76. This Court declared that the intent of Congress in passing the Clayton Act was "to promote competition through the protection of viable, small, locally owned businesses" even though this might occasionally result in "higher costs and prices." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Similar political and economic concerns, to protect independent retail stores from chain stores, led Congress to enact the Robinson-Patman Act. *Exxon*, 437 U.S. at 133 nn.25,26. The New York legislature intended to promote the Sherman Act goal of protecting small competitors. *J.A.J. Liquor Store*, 64 N.Y.2d at 520, 479 N.E.2d at 788, 490 N.Y.S.2d at 152, J.S. 14A; *House of Spirits v. Doyle*, 72 Misc. 2d at 1038-41, 339 N.Y.S.2d at 498-500; Final Report 29-30; N.Y. Legis. Ann. 80-82 (1971).

Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

458 U.S. at 661. Evaluated under this framework, which this Court has applied to a vertical price challenge, *see Fisher*, 106 S. Ct. at 1048, the facial challenge to § 101-bb(2) must fail because, as demonstrated below, that statute does not mandate, authorize, or irresistibly compel conduct which in *all* cases is a *per se* violation of the Sherman Act.

A. A unilateral restraint on competition imposed by government to the exclusion of private control does not violate the Sherman Act

In *Fisher*, this Court declared that it “has always limited the reach of § 1 of the Sherman Act, to ‘unreasonable restraints of trade effected by a contract, combination . . . , or conspiracy’ between *separate* entities.” 106 S. Ct. at 1049 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)) (emphasis by *Copperweld* Court). Furthermore, it is essential to distinguish unilateral activity “from a concerted effort by more than one entity to fix prices or otherwise restrain trade,” *Fisher*, 106 S. Ct. at 1049 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984)), because “[e]ven where a single firm’s restraints directly affect prices and have the same economic effect as concerted action might have, *there can be no liability under § 1 in the absence of agreement.*” *Fisher*, 106 S. Ct. at 1049 (emphasis supplied). *See also Monsanto*, 465 U.S. at 763 (“it is of considerable importance that independent action

. . . be distinguished from price-fixing agreements”²²; *United States v. Parke Davis & Co.*, 362 U.S. 29, 44 (1960); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Under this Court’s most recent analyses, since New York’s minimum markup law sets prices “without this element of concerted action, the program it establishes cannot run afoul of § 1.” *Fisher*, 106 S. Ct. at 1049. There, this Court rejected a similar facial challenge under the Sherman Act because “under settled principles of antitrust law,” the rent controls unilaterally imposed by a municipal ordinance “lack[ed] the element of concerted action needed before they can be characterized as a *per se* violation of § 1. . . .” 106 S. Ct. at 1051. The landlords challenging the ordinance on its face contended that it formed a combination between the city and its officials, on the one hand, and the property owners on the other. They also claimed that it created a horizontal combination among the landlords. *Id.* at 1049. In rejecting these contentions, this Court explained the concerted action requirement of § 1:

A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

Id. at 1049-50. Similarly, even though the ordinance might have the same economic effect as a horizontal cartel, *id.* at 1049, compliance by competing property owners with the same provisions

²² Indeed, in *Monsanto*, this Court declared:

On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

of the ordinance was not enough to establish a conspiracy among the landlords since "control over the maximum rent levels of every affected residential unit ha[d] been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board." *Id.* at 1050. There simply was "no meeting of the minds." *Id.* New York's minimum price statute, together with Rule 16.4(e), operates exactly the same way.

B. There is no contract, combination, or conspiracy under New York's minimum markup statute, which unilaterally imposes price restraints on the retailer

Section 101-bb(2), like the ordinance in *Fisher*, unilaterally imposes price restraints. Under the New York law, the Legislature has removed all control over minimum prices from retailers. The retailers must impose a 12% minimum markup above cost in virtually all cases.²³ Similarly, the statute and Rule 16.4(e) give no control to the wholesaler or to the SLA commissioners to vary that percentage or to establish any particular retail price. Both the wholesalers and the retailers must obey the same regulatory commands, but those regulatory commands involve "no meeting of the minds."

The statute simply does not mandate, authorize, or compel anyone to enter into a price-fixing conspiracy or agreement. Appellant does not allege the existence of such an agreement and consequently does not assert that there is any contract, combination, or conspiracy under the statute. The only agreement appellant perceives is the retailer's acceptance of the wholesaler's "artificially high mark-ups," not by any words in § 101-bb, but rather under *Bulletin* 471. App. Br. 21-24; J.S. 13 n.18. Indeed, the Solicitor General has expressly conceded that the statutory 12% minimum markup is imposed "at the command of the state, and not as a result of a private agreement between the wholesaler and retailer." Brief for the United States as *Amicus Curiae* at 9.

²³ The statute authorizes the SLA to permit the retailer to sell below cost in a few carefully circumscribed situations under its strict supervision. APC Law §§ 101-bb (3), (4).

The inability of the appellant and the Solicitor General to find an agreement under § 101-bb(2) is understandable because the 12% minimum markup is imposed by the government, just as price controls were governmentally mandated in *Fisher*. Nothing in the statute and Rule 16.4(e) permits either the wholesaler or the retailer to alter this percentage.²⁴ Under the scheme by which the state has displaced competition at all three levels of liquor distribution, both the case and bottle prices are a function of the price to the wholesaler set by the manufacturer. As explained in the Statement of the Case, the ABC Law narrowly limits the ability of a New York wholesaler to change the bottle or case price for a particular brand which it sells to the retailer by specifying the only circumstances under which it may alter these prices. Furthermore, under § 101-bb(2) and Rule 16.4(e), the posted case and bottle price must be the same. Thus, in the absence of the Bulletin, the wholesaler has almost no ability to affect the effective markup by manipulating the case and bottle prices.²⁵

C. Section 101-bb(2) is not an illegal hybrid restraint enforcing private market decisions

This Court has carefully distinguished unilateral restraints imposed by government on private actors, such as rent controls, which are "outside the purview of § 1," *Fisher*, 106 S. Ct. at 1050, from purely private restraints, *Norman Williams*, 458 U.S. at 665-66 (Stevens, J., joined by White, J., concurring), and from illegal hybrid restraints in which "nonmarketing mechanisms merely enforce private marketing decisions." *Fisher*, 106 S. Ct.

²⁴ The Court of Appeals statement that 101-b(3) "does not mandate any price ratio between scheduled case and bottle prices," *J.A.J. Liquor Store*, 64 N.Y.2d at 523, 479 N.E.2d at 790, 490 N.Y.S.2d at 154, J.S. 18A, referred to the operation of the statute in the absence of Rule 16.4(e), which expressly mandates just such a ratio.

²⁵ Indeed, the promulgation of the Bulletin pursuant to § 101-b, not challenged here, was designed to permit wholesalers to do that which the statute and the Rule did not authorize them to do — post off (reduce) the case price in the absence of changes in the wholesaler's own costs and without making a corresponding change in the bottle price.

at 1050; *Norman Williams*, 458 U.S. at 665-66 (Stevens, J., joined by White, J., concurring).

There are two factors which distinguish purely governmental restraints, such as rent controls and New York's minimum markup statute, from the illegal hybrid restraints in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). First, in the purely governmental restraint, the price is set by the state itself. In the illegal hybrid restraint, private parties set the price (with or without some government supervision). Second, in the purely governmental restraint, only the state enforces the restraint.²⁸ In the illegal hybrid restraint, private parties have sole or joint responsibility to enforce the restraint, which permits them to coerce selectively other private parties.

In *Schwegmann*, a Louisiana statute authorized liquor distributors to make contracts with retailers fixing minimum retail prices (then permitted by the now-repealed Miller-Tydings Act) and to enforce those privately-fixed retail prices against non-signing retailers who refused to adhere to those price restraints. After finding that enforcement against nonsigners was not authorized by the Miller-Tydings Act, this Court held that two liquor distributors who attempted to enforce those privately-fixed retail prices violated the Sherman Act. As this Court explained in *Fisher*, the critical defect in the Louisiana statute was that "both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of the distributors." *Fisher*, 106 S. Ct. at 1050 (emphasis supplied). Even though the retailer "may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana." *Id.* (emphasis

²⁸ The presence of either factor alone would be insufficient. If the government fixed the price, but left it to private parties to enforce it, it would not be a purely governmental restraint. Likewise, if the state enforced a private agreement to restrain trade, as in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), it would not be a purely governmental restraint.

supplied). The state played no role either in determining any portion of the price or in enforcing the price maintenance scheme.

The resale price maintenance system in *Midcal* "entailed a similar degree of free participation by private economic actors." *Fisher*, 106 S. Ct. at 1050. In that case, the California statute required all wine producers, wholesalers and rectifiers to file fair trade contracts or functionally equivalent price schedules. No state-licensed wine merchant could sell wine to a retailer at other than the price set in such fair trade contracts or price schedules. *Midcal*, 445 U.S. at 99. Under state regulations, wine prices set by a single wholesaler within a trading area bound all wholesalers in that area. *Id.* The private resale price maintenance scheme was enforced both by private damage suits, *id.* at 100 n.2, and by fines, suspensions, and revocations. *Id.* at 100.

This Court found that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." *Id.* at 103 (citations omitted). As this Court recognized in *Fisher*, "the mere existence of legal compulsion did not turn California's scheme into unilateral action by the State," 106 S. Ct. at 1051, since "[t]he State ha[d] no direct control over wine prices, and it [did] not review the reasonableness of the prices set by wine dealers." *Id.* at 1051 (quoting *Midcal*, 445 U.S. at 100). See also *Hoover v. Ronwin*, 466 U.S. 558 (1984) (*Midcal* simply a "private price-fixing arrangement authorized by State"); *Norman Williams*, 458 U.S. at 667 n.2 (Stevens, J., joined by White, J., concurring) ("All California retailers were required to sell wine at the price the distributors fixed . . . Even though the State presumably could regulate the wine market by fixing retail prices itself, it could not empower private parties to undertake such regulation"). As in *Schwegmann*, the state played no role whatever in determining any portion of the price or the price range. See *Midcal*, 445 U.S. at 101 (citing *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 445, 579 P.2d 476, 486, 146 Cal. Rptr. 585, 595 (1978)).

These hybrid restraints are "thus quite different from the pure regulatory scheme[s] imposed by Berkley's Rent Stabilization

Ordinance," *Fisher*, 106 S. Ct. at 1051, and New York's minimum markup statute. In *Fisher*, even though the ordinance gave "tenants—certainly a group of interested private parties—some power to trigger the enforcement of its provisions, it place[d] complete control over maximum rent levels in the hands of the Rent Stabilization Board." 106 S. Ct. at 1051. Both the controls themselves and the rent ceilings they mandated were unilaterally imposed by the city on the landlords. *Id.* New York imposes the markup and the amount itself.²⁷ The statute on its face does not authorize the wholesaler to set any price other than its own.²⁸ The SLA has sole power to enforce the statute. ABC Law § 101-bb(4).²⁹

²⁷ The presence of a privately-determined component of the price does not transform state price regulation into an *illegal* hybrid restraint which simply enforces private market decisions. In *Fisher*, Measure D, the challenged ordinance, imposed rent controls on privately-set rents previously frozen at the June 1978 levels by Measure I, the Rental Property Tax Relief Ordinance. See Appellant's Brief at 5-6, *Fisher*. Here, too, the presence of a privately-determined portion of the retail price—the wholesaler's price to the retailer—is irrelevant to the facial validity of the unilaterally-imposed 12% minimum markup.

²⁸ This analysis is consistent with this Court's decisions in other hybrid price-fixing cases in which it found, or assumed without deciding, that the restraint would violate the Sherman Act before addressing the state action doctrine. In each case, private parties played the primary role in price-fixing, with or without some government supervision, and in one case also had an enforcement role. In *Parker*, although the state alone enforced the program, private parties, with government review, set prices. Indeed, this Court later noted that "there was significant private participation in the formulation and effectuation of the pro-ration program." *Cantor*, 428 U.S. at 592 n.25 (opinion of the Court).

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), private parties, in a "classic example of price fixing," *Bates v. State Bar of Arizona*, 433 U.S. 350, 359 (1977), set the prices and enforced them. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985), although the state public service commissions exercised ultimate authority over rates and enforced them, private parties set those rates.

²⁹ The Legislature did not provide any mechanism for private enforcement under the ABC Law. Indeed, New York's highest court has ruled that when the Legislature has enacted remedial legislation with a comprehensive system of purely governmental enforcement courts should not infer a private right of action. See *Burns, Jackson, Miller, Summit & Spritzer v. Lindner*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983).

D. Section 101-bb(2), like other minimum markup statutes, is not a per se violation of the Sherman Act

Courts adopt *per se* rules only "with respect to certain business practices that have proved to be predominantly anticompetitive." *Northwest Wholesale Stationers*, 105 S. Ct. 2613, 2617 (emphasis supplied). Indeed, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).³⁰ Minimum markup laws, like other below cost statutes, and unlike resale price maintenance schemes, have never been held to be *per se* violations of the Sherman Act.³¹ Lower courts have routinely rejected Sherman Act challenges to minimum markup statutes.³² Indeed, both the

³⁰ This Court is reluctant to expand the categories of *per se* violations. See, e.g., *Federal Trade Comm'n v. Indiana Federation of Dentists*, 54 U.S.L.W. 4531, 4534 (U.S. June 2, 1986).

³¹ Even if this Court were to characterize minimum markup statutes and below cost and loss leader prohibitions as price-fixing, it has never gone so far as to suggest that price-fixing by a state acting as sovereign to displace competition is a *per se* violation of the Sherman Act. Indeed, this Court has repeatedly indicated that it would be permissible if the state acting as sovereign itself fixed prices. See, e.g., *Midcal*, 445 U.S. at 106 (noting state itself had not set prices); *Southern Motor Carriers*, 105 S. Ct. at 1736 n.13 (Stevens, J., joined by White, J., dissenting).

³² See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981) (Kaufman, J.), *aff'g*, *Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn.); *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641 (N.D. Ohio 1982); *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,493 (E.D. Ark. 1980); *Hartsock-Fletcher Candy Co. v. Wheeling Wholesale Grocery Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,321 (W. Va. 1984); *Walker v. Bruno's, Inc.*, 650 S.W.2d 357 (Tenn. 1983); *George W. Cochran Co. v. Comptroller of Treasury, Alcohol and Tobacco Tax Division*, 437 A.2d 194 (Md. 1981); *Baseline Liquors v. Circle K Corp.*, 129 Ariz. 215, 630 P.2d 38 (Ariz. Ct. App. 1981), *cert. denied sub nom. Skaggs Drug Centers, Inc. v. Baseline Liquors*, 454 U.S. 969 (1981); *Rice v. Alcohol Beverage Control Appeals Board*, 21 Cal.3d 431, 458, 579 P.2d 476, 494, 146 Cal. Rptr. 585, 603 (1978). See also Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693, 733 (1974) ("Since neither the wholesalers nor the retailers determine the mark-ups to be charged, obeying the statute should involve no combination or conspiracy for purposes of the Sherman Act.").

appellant and the Solicitor General recognize that minimum markup statutes do not violate the Sherman Act. App. Br. 23 n.23, 24 n.24, 32 n.31; J.S. 12, 14, Brief for the United States as *Amicus Curiae* Supporting Appellant at 12; Brief for the United States as *Amicus Curiae* at 9 n.13.

At least 35 states have some form of minimum markup, below cost or loss leader statute (which may cover all products or only a particular commodity such as milk, tobacco, liquor, or gasoline).²² Under the typical minimum markup statute, a seller

²² See, e.g., (1) *all products*: Ark. Stat. Ann. §§ 70-303-70-307 (1979); Cal. Bus. & Prof. Code §§ 17026, 17026.5, 17029-17030, 17043-17045, 17071-17074, 17077 (Deering 1976 & Supp. 1986); Colo. Rev. Stat. §§ 481-3 *et seq.* (1976); Idaho Code § 48-401 *et seq.* (1977); Ky. Rev. Stat. Ann. §§ 365.030, 365.040 (Bobbs-Merrill 1972); La. Rev. Stat. Ann. §§ 51: 421-51: 423 (West 1965); Me. Rev. Stat. Ann. tit. 10, §§ 1202 *et seq.* (1964); Md. Com. Law Code Ann. 11-401 *et seq.* (1983); Mass. Ann. Laws ch. 93, § 2 14E-14G (Michie/Law. Co-op 1985); Minn. Stat. Ann. §§ 325 D.01 *et seq.* (West 1981); Mont. Code Ann. §§ 30-14-201 *et seq.* (1985); N.D. Cent. Code §§ 51-10-01 *et seq.* (1981); Okla. Stat. Ann. tit. 15, §§ 598.1 *et seq.* (West 1966); Pa. Stat. Ann. tit. 73, §§ 212 *et seq.* (Purdon 1971); R.I. Gen. Laws §§ 6-13-1 *et seq.* (1985); S.C. Code Ann. § 39-3-150 (Law. Co-op 1985); Tenn. Code Ann. §§ 47-25-201 *et seq.* (1984); Utah Code Ann. § 13-5-7 *et seq.* (1973); W. Va. Code §§ 47-11A-1 *et seq.* (1980); Wis. Stat. Ann. §§ 100.30, 100.201 (West 1985 & Supp. 1985); Wyo. Stat. § 40-4-107 *et seq.* (1977);

(2) *milk and dairy products*: Ark. Stat. Ann. § 70-701 *et seq.* (1979); Cal. Food & Agric. Code §§ 61383-61384 (Deering 1983); Idaho Code § 37-10036 (Supp. 1983); Ky. Rev. Stat. Ann. §§ 365.680, 365.705 (Bobbs-Merrill 1981); La. Rev. Stat. Ann. §§ 3: 4102, 3:4104 (West Supp. 1986); Me. Rev. Stat. Ann. tit. 7, § 2954 *et seq.* (1964 & Supp. 1985); Minn. Stat. Ann. §§ 32A.04, 32A.07 (West 1981 & Supp. 1986); Mo. Ann. Stat. § 16.410 *et seq.* (Vernon 1979 & Supp. 1986); N.Y. Agric. & Mkts Law §§ 258-m, 258-r, 258-u, 258-x (McKinney 1972 & Supp. 1986); N.C. Gen. Stat. § 106-266-19 (1978); Okla. Stat. Ann. tit. 2, §§ 7-322 *et seq.* (West Supp. 1985); Tenn. Code Ann. §§ 53-3-201 *et seq.* (1984);

(3) *cigarettes*: Ark. Stat. Ann. §§ 70-601 *et seq.* (1979); Conn. Gen. Stat. Ann. § 12-322 *et seq.* (West 1983 & Supp. 1986); Del. Code Ann. § 2601-2606 (Supp. 1984); Ind. Code Ann. §§ 24-3-2-1 *et seq.* (Burns 1982); Iowa Code Ann. §§ 551A.1 *et seq.* (West 1980 & Supp. 1985); Ky. Rev. Stat. Ann. §§ 365.270 *et seq.* (Bobbs-Merrill Supp. 1984); Md. Com. Law Code Ann. §§ 11501 *et seq.* (1983); Mass. Ann. Laws ch. 64c, §§ 12-16, 20 (Michie/Law. Co-op. 1978); Minn.

(footnote continued)

in the distribution system is prohibited from selling below its "cost" as defined in the statute. The statutes generally do not refer to accepted accounting or economic definitions of cost, but instead define cost for purposes of the statute as the seller's invoice price or replacement cost plus a markup for overhead or doing business. In some cases, the legislature defines this markup in terms of a percentage of the invoice price or replacement cost.²³ In other cases, the legislature simply identifies certain factors which are included in the "cost" or the markup.²⁴

Stat. Ann. § 325D.31 *et seq.* (West 1981 & Supp. 1986); Miss. Stat. Ann. §§ 75-23-1 *et seq.* (1972); Mont. Code Ann. §§ 16-10-103 *et seq.* (1985); Neb. Rev. Stat. § 59-1501 *et seq.* (1984); N.J. Stat. Ann. §§ 56: 7-19-56:7-30 (West 1964 & Supp. 1985); N.Y. Tax Law §§ 483-486 (McKinney Supp. 1986); Ohio Rev. Code Ann. §§ 1333.11-1333.19 (Page 1979); Okla. Stat. Ann. tit. 68, §§ 327 *et seq.* (West Supp. 1985); Pa. Stat. Ann. tit. 73, §§ 231.1 *et seq.* (Purdon 1971); Tenn. Code Ann. §§ 47-25-301 *et seq.* (1984 & Supp. 1985); Va. Code § 59.1 *et seq.* (Supp. 1985); Wash. Rev. Code Ann. § 19.91.010 *et seq.* (1978 & Supp. 1986);

(4) *gasoline and motor fuel*: Ga. Code Ann. §§ 10-1-251 *et seq.* (Supp. 1985); N.J. Stat. Ann. §§ 56: 6-1 *et seq.* (West 1964 & Supp. 1985); Utah Code Ann. §§ 13-16-1 *et seq.* (Supp. 1986);

(5) *drugs*: Conn. Gen. Stat. Ann. §§ 21a-126, 21a-128 (West 1985); La. Rev. Stat. § 51:522 (West 1965); and

(6) *fruits and vegetables*: Wash. Rev. Code Ann. §§ 15.21.020, 15.21.030, 15.21.040 (1971).

²³ A typical example is California, which provides that in the absence of proof, a markup of 6% on the invoice or replacement cost "shall be prima facie proof of [the] cost of doing business." Cal. Bus. Prof. Code § 17026 (Deering Supp. 1986). As a practical matter, it is impossible for a retailer to establish the "cost of doing business" for any particular item and, therefore, the statutory percentage becomes the markup. See, e.g., Comment, *Sales Below Cost Prohibition Private Price Fixing Under State Law*, 57 Yale L.J. 391, 412-13 (1948).

²⁴ For example, the Arkansas below cost statute defines distribution "cost" as "the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor or vendor." Ark. Stat. Ann. § 70-303 (1979). It defines the "cost of doing business" or "overhead expense" as

(footnote continued)

The New York statute, together with Rule 16.4(e), operates exactly the same way as the minimum markup liquor statutes which the appellant and the Solicitor General concede do not violate the Sherman Act. Indeed, by specifying the markup in the statute and limiting the grounds for modification, the New York Legislature has greater control over prices than other states do. Under § 101-bb(2), the retailer may not sell below its replacement cost — the bottle price then in effect — plus a markup of 12%, which the Legislature found “to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of [the] item of liquor.” As demonstrated above, under the statute and Rule 16.4(e) the bottle price and case price are the same except for the minor breakage charge and the maximum 3% trade discounts.²⁸

E. Bulletin 471 does not violate the Sherman Act because there is no agreement to restrain trade

The entire focus of the appellant’s “as applied” attack on § 101-bb(2) is the anticompetitive effect of Bulletin 471.²⁹ By focusing

all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising.

Id.

²⁸ The use of the price schedule “in effect at the time the retailer sells or offers to sell [the] item of liquor,” § 101-bb(2)(b), is a rational adoption of the generally accepted accounting definition used to define inventory cost — last in — first out (“LIFO”). Use of LIFO here eliminates the administrative nightmare of keeping track of each item of liquor and takes into account the effects of inflation.

²⁹ The New York Court of Appeals found that “the Appellate Division erred in using the purported anticompetitive effect of Bulletin 471 as a basis for in
(footnote continued)

on the anticompetitive impact of the Bulletin, appellant ignores this Court’s firm rejection of the “market impact” test as a substitute for an agreement to restrain trade. *Fisher*, 106 S. Ct. at 1049; *Monsanto*, 465 U.S. at 762. The bulk of appellant’s argument is entirely irrelevant, however, because it has failed to establish that Bulletin 471 mandates, authorizes, or irresistibly compels a violation of the Sherman Act in all cases. *Norman Williams*, 458 U.S. at 661.

The Bulletin is not, as appellant now contends, an illegal hybrid restraint like those in *Schwegmann* and *Midcal*. First, the Bulletin does not give the wholesaler “a similar degree of free participation by private economic actors.” *Fisher*, 106 S. Ct. at 1050. Although the Bulletin permits the wholesaler to determine a component of the retail price during temporary sales, the state limits the range within which the wholesaler may affect the base price for the markup which the state itself determines. In *Schwegmann*, on the other hand, the distributors had complete freedom to select “minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors.” *Fisher*, 106 S. Ct. at 1050. In *Midcal*, the wine producers selected — without any limit — the minimum price levels and jointly with the state enforced those levels. The “state play[ed] no role whatever in setting the retail prices.” *Midcal*, 445 U.S. at 100 (quoting *Rice*

validating section 101-bb” because under New York law, “[c]onstitutional problems created by a regulation should be resolved by invalidation of the regulation alone, not invalidation of both the statute and the regulation[.]” 64 N.Y.2d at 523, 479 N.E.2d at 790, 490 N.Y.S.2d at 154, J.S. 18A (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 154, 446 N.E.2d 428, 435, 459 N.Y.S.2d 743, 750 (1983)) (where nothing in the statutes required adoption of the invalid regulation or prevented state commission from adopting a new, valid regulation, court should declare regulation not statute, invalid). This is consistent with the intent of the Legislature. See ABC Law § 161.

Thus, if this Court were to find the Bulletin invalid on the grounds advanced by appellant, the proper approach would be to invalidate the Bulletin alone, not § 101-bb. Nothing in the ABC Law requires adoption of the Bulletin and, as Rule 16.4(e) demonstrates, the ABC Law permits a regulation which meets appellant’s objections.

v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d at 445, 579 P.2d at 496, 146 Cal. Rptr. at 595 (1978)) (emphasis supplied). Louisiana and California did no more than enforce those privately-set prices. *Id.* Under Bulletin 471, however, New York does play a major role in determining minimum price levels by establishing the statutory markup itself and by providing that the wholesaler may not increase the legal bottle price during a post-off period. Moreover, only the state enforces the Bulletin.

Second, appellant is challenging actions of state officials enforcing the statute. It has not sued wholesalers claiming that they violated the Sherman Act. As this Court recognized in *Bates*, "Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party." 433 U.S. at 361 (footnote omitted).

Finally, *Fisher* rejects appellant's erroneous contention that *Midcal* and *Schwegmann* dispense with the concerted action requirement when the state itself unilaterally imposes a restraint in which a private party plays a role.²⁰ 106 S. Ct. at 1049-50. Thus, it rejected the dissent's claim that a "functional 'combination,'" *id.* at 1055 (Brennan, J., dissenting), between the landlords and the city and its officials was sufficient to establish a contract, combination, or conspiracy to restrain trade. Therefore, under *Fisher*, any "functional combination" produced by the Bulletin between wholesalers and retailers does not violate the Sherman Act.

II. THE IMPOSITION OF A 12% MINIMUM MARKUP ABOVE RETAIL COST BY THE NEW YORK LEGISLATURE IS IMMUNE FROM AN ANTITRUST CHALLENGE UNDER THE STATE ACTION DOCTRINE

This Court need not address the question whether, even if the minimum markup statute mandated § 1 violations, it would be

²⁰ In *Schwegmann*, there was concerted action between the distributor and at least one retailer seeking to force a third party to adhere to their resale price maintenance contract. In *Midcal*, the focus of this Court's concern was on the fair trade contract aspect of the statute, not the price posting requirement.

immune under the *Parker* state action doctrine from antitrust scrutiny because, as demonstrated above, the statute on its face does not mandate, authorize, or irresistibly compel a violation of the Sherman Act. *Fisher*, 106 S. Ct. at 1051. Nevertheless, the minimum markup statute is immune from antitrust scrutiny under the state action doctrine²¹ because the New York Legislature, acting as sovereign, displaced competition at all three liquor distribution levels with a scheme establishing a minimum markup above retail cost. In analyzing a state statute and the activities of state officers directed by the legislature in such circumstances, the second-prong of *Midcal* does not apply, *Hoover v. Ronwin*, 466 U.S. 558, 569 (1985) ("where the conduct at issue is in fact that of the state legislature . . . , we need not address the issues of 'clear articulation' and 'active supervision.'"). In any event, appellees' enforcement of the minimum markup statute satisfies both prongs of the *Midcal* test.

A. The New York Legislature imposed the 12% minimum markup

It is well-established that "[t]he starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown*." *Hoover v. Ronwin*, 466 U.S. at 567; See also *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1716 (1985). In *Parker*, this Court addressed an antitrust challenge to the California Agriculture Prorate Act, a state statute which restricted supply and fixed prices of 95% of the nation's raisin supply and one half of the world's supply. "Relying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature[.]" *Ronwin*, 466 U.S. at 567. The *Parker* Court explained:

²¹ This Court has analyzed the *Parker* state action doctrine in both preemption and exemption terms. See, e.g., *Norman Williams*, 458 U.S. 1 at 659 (determining whether the Sherman Act preempted a state statute); *Parker*, 317 U.S. at 350 (argued as a preemption case); *Southern Motor Carriers*, 105 S. Ct. at 1726 n.18 ("the state action doctrine is an implied exemption to the antitrust laws"). Regardless which approach this Court adopts here, however, the minimum markup statute is immune from antitrust scrutiny.

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-51.

Thus, as this Court later explained in *Ronwin*, "under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State, and *ipso facto* are exempt from the operations of the antitrust laws." 466 U.S. at 568 (citation omitted). See also *Bates*, 433 U.S. at 360 (decision of state supreme court acting legislatively, rather than judicially, is exempt from Sherman Act liability as state action); *Goldfarb*, 421 U.S. at 790. A different analysis is required when the restraint is not directly that of a legislature, but is carried out by others pursuant to state authorization. *Ronwin*, 466 U.S. at 568-69. Here, the challenged 12% minimum markup was established by the New York Legislature and, therefore, exempt from Sherman Act liability as state action. Even if characterized as private activity, either the wholesaler setting his price to the retailer pursuant to statute or the retailer charging at least 12% above his cost pursuant to statute, this state-mandated activity is also immune.

B. The 12% minimum markup is immune under the state action doctrine

The 12% minimum markup above retail cost is immune under the state action doctrine because the New York Legislature enacted § 101-bb as sovereign and as part of a clearly articulated and affirmatively expressed policy to displace competition. *Midcal*, 445 U.S. at 105. Since it acted as sovereign, the restraint need only be affirmatively expressed as state policy. *Hoover v. Ronwin*, 466 U.S. at 568. Moreover, the statute is not simply a "gauzy cloak" over essentially private activity, *Midcal*, 445 U.S. at 106,

because the state plays a role in setting prices and it alone enforces those prices. The New York statute more than adequately satisfies the requirements for state action.

This Court has repeatedly emphasized both in price-fixing and other cases that a statute affirmatively expressing a state policy to displace competition is immune. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), for example, this Court rejected a Sherman Act challenge to a state automobile dealer franchise act under the state action doctrine because the state "regulatory scheme [was] a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." See also *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.); *Hallie*, 105 S. Ct. at 1716.

In *Southern Motor Carriers*, this Court concluded that the collective rate-making activities of private parties, which were supervised by regulatory schemes designed to displace competition, were immune state action. 105 S. Ct. at 1729 (contrasting the activities in *Goldfarb* where the state, as sovereign, did not have a policy designed to displace price competition among lawyers). In *Midcal* and *Schwegmann*, the states did not have regulatory schemes designed to displace competition.* They simply authorized private price-fixing without any state involvement other than enforcement.

The minimum markup statute satisfies this first requirement. As detailed above in the Statement of the Case, New York acted pursuant to a clearly articulated and affirmatively expressed policy to displace competition at all three levels of the liquor distribution system, and both the appellant and the Solicitor General agree. App. Br. 31; Brief for the United States as *Amicus Curiae* Supporting Appellant at 15.

* In addition, in neither case did the state actively supervise the restraint. This second prong of the *Midcal* test no longer applies, however, when the state acts directly as sovereign in imposing the restraint. *Hoover v. Ronwin*, 466 U.S. at 569.

Moreover, for at least two reasons, Section 101-bb does not cloak essentially private activity. First, the state plays a role in determining the ultimate prices set. In *Parker*, the California statute authorized the creation of an Agricultural Prorate Advisory Commission, composed of state officials, which exercised control over the program by approving or modifying the supply restrictions and prices fixed by private parties. In *Southern Motor Carriers*, immunity attached to the collective rate-setting by private parties because the states each had and exercised ultimate authority and control over the intrastate rates. 105 S. Ct. at 1724.

In contrast, in *Schwegmann*, *Goldfarb*, and *Midcal*, the state played no role in determining any aspect of the prices set by private parties. In *Schwegmann*, Louisiana authorized private resale price maintenance, but had no power to review, limit, or reject the prices established by private parties. In *Goldfarb*, the Virginia Supreme Court played no role in determining the minimum fee schedules set by the private bar associations. In *Midcal*, this Court contrasted the "extensive official oversight" in the *Parker* program with the resale price maintenance system under attack. 445 U.S. at 104. "Without such oversight," it concluded, "the result [in *Parker*] could have been different." *Id.* The California resale price maintenance system lacked any governmental oversight whatsoever and California played no role in determining prices. *Id.* at 101 (citing *Rice*, 21 Cal. 3d at 445, 579 P.2d at 486, 146 Cal. Rptr. at 595):

[T]he State simply authorizes price setting and enforces the prices established by private parties. The State *neither establishes prices* nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

445 U.S. at 105-06 (footnote omitted) (emphasis supplied). In short, the state threw "a gauzy cloak of state involvement over what [was] essentially a private price-fixing arrangement". *Id.* at 106.

The New York Legislature, however, establishes complete control over the minimum markup by establishing the amount of the markup itself and by delegating to SLA officials the authority to permit exceptions. Under the statute, neither the wholesaler nor the retailer has ultimate control over the amount of the markup.

Second, the state is the sole enforcer of the markup. In *Parker*, the program was enforced solely by the state through criminal and civil penalties, 317 U.S. at 347, and in *Southern Motor Carriers*, public service commissions enforced the privately set rates. On the other hand, in *Schwegmann*, "the exclusive power to enforce [resale minimum price] levels [was] left to the discretion of distributors." *Fisher*, 106 S. Ct. at 1050. Similarly, in *Midcal*, the resale price maintenance system was enforced jointly by private parties, 445 U.S. at 100 n.2, and by the state. *Id.* at 100.⁴¹

When private parties can do no more than trigger enforcement by requesting a hearing or investigation, conduct which is protected under the *Noerr-Pennington* doctrine,⁴² that private involvement is insufficient to take the activity outside the scope of state action. See *Orrin W. Fox*, 439 U.S. at 110. As shown above, the SLA has the exclusive power to enforce the minimum markup law.⁴³

⁴¹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), is not to the contrary. In *Bates*, not a price-fixing case, the Arizona Supreme Court completely defined and supervised enforcement by its agent, the State Bar. *Id.* at 361. Thus, there was no danger, as in illegal hybrid restraint, that private parties could engage in selective enforcement.

⁴² *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

⁴³ The presence of each of these factors in *Fisher* would have been sufficient to immunize the municipal rent control program under the state action doctrine had this Court reached that issue. Cf. 106 S. Ct. at 1051-53 (Powell, J., concurring) (rent control is immune as state action).

C. Bulletin 471 satisfies both prongs of the Midcal test

The issuance of Bulletin 471 satisfies both prongs of the *Midcal* test. The state as sovereign clearly intended to displace competition in this field with a regulatory structure. *Southern Motor Carriers*, 105 S. Ct. at 1731; *Ronwin*, 466 U.S. at 569. The state plays a role in setting the ultimate price by limiting the range within which the wholesaler can determine a component of the price and by determining a component of the price in establishing the minimum markup. Moreover, as with the statute, the state alone enforces the Bulletin.

Bulletin 471 also satisfies the second prong. Judge Kaufman's opinion in *Morgan*, in which the court of appeals affirmed a district court decision that the Connecticut minimum markup statutes satisfied both prongs of the *Midcal* test, provides helpful guidance because, at the time of the decision, lower courts were interpreting *Midcal* as requiring state legislative action to satisfy both prongs. The court of appeals concluded that the Connecticut law satisfied the second prong because the policy was actively supervised,⁴⁰ the Legislature frequently debated the merits of the pricing system, and it "structur[ed] a detailed mechanism for determining prices." *Morgan*, 664 F.2d at 356.

The New York Legislature, likewise, actively supervised the issuance of this regulation by the SLA.⁴¹ It amended § 101-b twice,

⁴⁰ The district court noted that the Liquor Control Commission, which enforced the act, was composed of commissioners appointed by the governor and subject to removal for cause. The commission had the power and duty to enforce the act and make all necessary regulations. It had the power to declare an emergency, conduct all necessary inquiries and regulations, hold hearings with the power to subpoena witnesses and documents and to administer oaths and take testimony, and was responsible for the award, transfer, suspension of all liquor permits. *Serlin*, 512 F. Supp. at 942. The SLA has similar investigatory and enforcement powers. See ABC Law §§ 10-18, 101-b(4), 101-bb(4)-(5).

⁴¹ The New York Court of Appeals found that "the Bulletin is a proper exercise of the Liquor Authority's rule-making power under Alcoholic Beverage Control Law § 101-b(3)(b) and Alcohol Beverage Control Law § 101-b(4)." *J.A.J. Liquor Store*, 64 N.Y.2d at 523, 479 N.E.2d at 790, 490 N.Y.S.2d at 154, J.S. 18A.

in 1976 and again in 1979, without altering the Bulletin. Act of May 2, 1979, ch. 102, § 1, 1979 N.Y. Laws 333; Act of July 27, 1976, ch. 919, § 7, 1976 N.Y. Laws 1935, 1936. These later amendments, under well-settled principles of statutory interpretation, constitute ratification of the agency regulation. *Haig v. Agee*, 453 U.S. 280, 301 (1981); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939); *Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO v. Beekman*, 52 N.Y.2d 463, 472, 420 N.E.2d 938, 941, 438 N.Y.S.2d 746, 749 (1981) (legislative reenactment of statute without change deemed acceptance of interpretation); *National Elevator Industry, Inc. v. New York State Tax Comm'n*, 49 N.Y.2d 538, 548-49, 404 N.E.2d 709, 714-15, 427 N.Y.S.2d 586, 591-92 (1980) (citing *Helvering*). Furthermore, the Legislature has repeatedly reviewed the necessity of § 101-bb(2) and rejected several attempts to amend it. *J.A.J. Liquor Store*, 64 N.Y.2d at 520, 479 N.E.2d at 788, 490 N.Y.S.2d at 152, J.S. 15A. Finally, the SLA actively supervises implementation of Bulletin 471 and has power to alter it or to provide relief through the good cause exceptions and cost provisions. ABC Law § 101-b(3). It has vigorously enforced the Bulletin, as demonstrated by this litigation.

III. NEW YORK, UNDER ITS CORE POWERS TO IMPLEMENT THE TWENTY-FIRST AMENDMENT, MAY PROMOTE TEMPERANCE BY RAISING PRICES AND MAY STRUCTURE ITS LIQUOR DISTRIBUTION SYSTEM TO ENSURE THAT IT IS COMPOSED OF SMALL, AS WELL AS LARGE, RETAILERS

As demonstrated above, neither the minimum markup statute nor the Bulletin mandates, authorizes, or irresistibly compels a private price-fixing conspiracy and, in any event, both are immune under the *Parker* state action doctrine. Thus, there is no need for this Court to address the scope of the state's core powers to implement the twenty-first amendment by promoting temperance or structuring a wholly intrastate liquor distribution system to suit local needs. Nevertheless, the wide latitude granted to states in exercising these powers provides an additional reason for sustaining the challenged provisions. As demonstrated

below, New York, in direct contrast to California in *Midcal*, did exercise its core powers.

A. *The twenty-first amendment gives states wide latitude to regulate the distribution of liquor within their territories*

Only this June, this Court reaffirmed the well-established principle that the twenty-first amendment "gives the States wide latitude to regulate the importation and distribution of liquor within their territories." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 54 U.S.L.W. 4567, 4570 (U.S. June 3, 1986) (citing *Midcal*, 445 U.S. at 107). Indeed, this Court has repeatedly recognized that states have broad power to regulate alcoholic beverages within their borders to further both temperance and "other purpose[s] of the Twenty-first Amendment." *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058-59 (1984); see also *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 46-47 (1966). As demonstrated below in Points III. B. and C., the Legislature intended § 101-bb(2) to promote temperance by raising prices and to structure the liquor distribution system in a way which addresses local concerns.

As this Court explained the "wide latitude" which states have to regulate alcohol within their borders in *Midcal*,

[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.

445 U.S. at 110 (emphasis supplied). See also *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2709 (1984) (quoting this language approvingly). In exercising its powers to structure the liquor system, the state has a wide range of choices. It can create a monopoly, *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 63 (1936); regulate prices through affirmation statutes which have no extraterritorial effect, *Brown-Forman*, 54 U.S.L.W. at 4570; regulate the sale or use of liquor, *Capital Cities*, 104 S. Ct. at 2708; authorize private parties to set prices subject to ultimate state review, *Midcal*, 445 U.S. at

105; establish prices itself, *id.*; or, as here, require retailers to impose a minimum markup on retail prices, *Morgan*, 684 F.2d at 356.

In contrast, states do not exercise their core powers under the twenty-first amendment when they regulate prices of alcohol in other states, *Brown-Forman*, 54 U.S.L.W. at 4570; ban out-of-state liquor advertising on television without banning in-state advertising as well,⁴ *Capital Cities*, 104 S. Ct. at 2709; tax out-of-state liquor a higher rate to promote local industry, *Bacchus*, 104 S. Ct. at 3058-59; or authorize private parties to engage in resale price maintenance when the state plays *no role whatever* in setting retail prices. *Midcal*, 445 U.S. at 105.⁵

In the event of a potential conflict between the twenty-first amendment and the commerce clause, the court must "reconcile the interests protected by the two constitutional provisions" by considering each "in light of the other and in the context of the issues and interests at stake in any concrete case." *Brown-Forman*, 54 U.S.L.W. at 4570 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). This Court has indicated in *Bacchus*, *Capital Cities*, and *Midcal* how to reconcile such conflicts between a state's power to implement the twenty-first amendment and countervailing federal interests under the commerce clause.

In *Capital Cities*, this Court stated that the central question in that case, in *Midcal*, and in *Seagram* was essentially the same: "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment

⁴ Contrary to appellant's suggestion, App. Br. 44, states do exercise their core powers when they regulate liquor more strictly than beer or wine. New York's comprehensive price and other regulation of liquor distribution contrasts sharply with the selective approach Oklahoma took in *Capital Cities*.

⁵ Congress, however, recognized that price fixing by states was within the core powers of states to implement the twenty-first amendment. See S. Rep. No. 466, 94th Cong., 1st Sess. 1, 2, reprinted in 1975 U.S. Code Cong. & Admin. News 1569, 1571.

that the regulation may prevail, *notwithstanding* that its requirements *directly conflict* with express federal policies." 104 S. Ct. at 2708 (emphasis supplied). In contrast, citing *Seagram* and *Midcal*, it declared, that when a state has not exercised its core § 2 power, "a conflicting exercise of federal authority may prevail." *Id.* In *Capital Cities*, the "application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engage[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment" because the state did not also ban in-state liquor advertising as well. *Id.* at 2709. Therefore, because the state regulation "squarely conflict[ed]" with federal law and the state's "central power" under the twenty-first amendment was not "directly implicated, the balance between state and federal power tip[ped] decisively in favor of the federal law. . . ." *Id.* That is not, of course, the case here where the state's core powers to promote temperance and to structure the liquor distribution system to meet local needs are directly implicated.

In *Midcal*, this Court employed a similar analysis when it found that federal law prevailed over a state liquor regulation which did not directly implicate the state's core powers.* The Court carefully distinguished structuring the liquor distribution system, over which the states had "virtually complete control," 445 U.S. at 110, from other liquor regulations:

* In *Midcal*, California did not exercise its core powers to promote temperance or structure the liquor distribution system when it enacted resale price maintenance. California's highest court had found that resale price maintenance did not promote temperance. *Midcal*, 445 U.S. at 112 (quoting *Rice*, 21 Cal. 3d at 457-58, 579 P.2d at 494, 146 Cal. Rptr. at 603). Moreover, the California agency in charge of administering the resale price maintenance law expressly "rejected the argument that fair trade laws were necessary to the economic survival of small retailers." *Midcal*, 445 U.S. at 113 (quoting *Rice*, 21 Cal. 3d at 456, 579 P.2d at 493, 146 Cal. Rptr. at 602). This Court expressly left open the question whether, as here, "the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." *Midcal*, 445 U.S. at 113-14.

As demonstrated below, this is in direct contrast to this case where New York acted in a manner reasonably calculated to promote temperance and where appellant's own statistics demonstrate that adoption of § 101-bb cut the failure rate of liquor retailers by more than 60%. See Point III, B. and C., below.

Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'

Id. (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)) (emphasis supplied).

As an example of such a "pragmatic effort to harmonize state and federal powers," the Court cited several decisions where it had held private liquor companies liable for anticompetitive conduct not mandated by a state. 445 U.S. at 109-10. In each case, the private companies acted without any state involvement whatsoever, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945), or the state simply authorized the private companies to engage in such anticompetitive conduct, as in *Schwegmann*.

Similarly, in *Bacchus*, this Court found that a state regulation of liquor which did not implicate any clear concern of the twenty-first amendment had to yield to the federal interest under the commerce clause.* The sole purpose of the tax exemption for Hawaiian beverages was to favor a local industry over out-of-state competition. Such state laws were "not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 104 S. Ct. at 3058. Indeed, Hawaii did not even "seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledge[d] that the purpose was 'to promote a local industry.'" *Id.* at 3058-59. New York, however, has consistently acted to promote twenty-first amendment goals.

* Hawaii "expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its Motion to Dismiss or Affirm. Apparently, it was not until it prepared its brief on the merits in [the] Court that it became 'clear' to the State that the Amendment saves the challenged tax." 104 S. Ct. at 3057 n.12.

This Court has restricted the exercise by a state within its borders of its core powers against countervailing federal interests in only three limited circumstances. None of them has any bearing here. First, it has limited the state's enforcement power when it is in direct conflict with certain important non-economic rights, such as the protections of the first amendment, *California v. LaRue*, 409 U.S. 109 (1972); due process, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and equal protection. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (distinguishing power under twenty-first amendment to regulate economic matters from power to limit individual rights).

Second, this Court has limited the state's exercise of its core powers when the Constitution or Congress has expressly preempted the area. See, e.g., *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state tax on imports in direct conflict with express constitutional prohibition in export-import clause); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (state ban on liquor sales at international airport destined for foreign country in direct conflict with Federal Bureau of Customs authorization of such sales).

Third, it has limited those powers when the essence of federalism itself, apart from the generalized federal interest in free trade, mandates no other result, such as the need to assure free access to federal enclaves. *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973). This Court has never held, however, that when a state is exercising powers which *directly implicate* the central concerns of the twenty-first amendment that they must yield to the generalized concerns for free trade under the commerce clause or for free competition under the Sherman Act.²⁰

The minimum markup law operates only within the state. It does not strike at the essence of federalism in the manner of such local protectionist legislation struck down in *Bacchus*. It does not

²⁰ Neither *Midcal* nor *Bacchus* is to the contrary because, as demonstrated above at 36-37, in both the states were not exercising their core powers. Similarly, in *Brown-Forman*, New York had no power under the amendment to regulate prices outside its borders.

infringe important non-economic individual rights and neither the Constitution nor Congress has given a clear, unmistakable indication that it wanted to preempt state price regulation of liquor. Indeed, this Court disfavors preemption. *Exxon*, 437 U.S. at 132.

B. Section 101-bb(2) promotes temperance by raising prices to reduce consumption

One of the important reasons the Legislature adopted § 101-bb(2) was to promote temperance by raising prices. The Legislature acted "for the purpose of fostering and promoting temperance," ABC Law § 101-bb(1), in the face of a startling increase in consumption of distilled spirits in New York in the aftermath of repeal of resale price maintenance in 1964. In that year, per capita consumption was 1.81 gallons. By 1969, it had jumped to 2.29 gallons. Final Report 10. The Senate Excise Committee, which conducted a thorough review of the effects of lower prices resulting from repeal in 1964, recognized that a number of factors contributed to this dramatic increase (which was accompanied by an apparent increase in alcoholism and related ills),²¹ but concluded that widespread promotions of bargain prices "undoubtedly have made some contribution to a rise in per capita consumption of distilled spirits in this State since 1964." Final Report 35. Thus, the Committee squarely rejected the Moreland Commission's conclusions that "[t]he argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is . . . unfounded," and that "the assumption that most liquor buyers are price conscious is unsupported in fact." Moreland Comm'n, Report and Recommendation No. 3, at 17.

²¹ At the time the New York Legislature acted, the federal government estimated that the cost of alcoholism and alcohol abuse was \$15 billion per year. Dep't of Health Education and Welfare, *Alcohol and Health* vii (1971) (cited in *Alcohol and the State* 52). Current estimates of the costs are closer to \$100 billion and include approximately 75,000 alcohol related deaths each year. Cook, *Increasing the Federal Alcohol Excise Tax, in Toward the Prevention of Alcohol Problems: Government, Business and Community Action*, 24, 25 (D. Gerstein ed. 1984).

The Committee's conclusions were well-founded, however. Far more sophisticated studies³⁴ than those examined by the Moreland Commission have overwhelmingly supported the Committee's conclusion by demonstrating that there is a significant correlation between increasing prices and decreasing consumption.³⁵ Appellees are unaware of any reputable study in recent years which

³⁴ This Court routinely relies on studies which bear on the reasonableness of legislation. *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908). See also *Ballew v. Georgia*, 435 U.S. 223 (1978) (opinion of Blackman, J.); *Misunde v. Arizona*, 384 U.S. 436, 448 n.8 (1966); *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954). For the convenience of the Court, appellees lodged copies of these studies with the Clerk simultaneously with the filing of this brief.

³⁵ See, e.g., Coate & Grossman, *Effects of Alcoholic Beverage Prices and Legal Drinking Ages on Youth Alcohol Use*, National Bureau of Economic Research, Working Paper No. 1852 (March 1986) ("Coate & Grossman"); Cook, *The Economics of Alcohol Consumption and Abuse in Alcoholism and Related Problems* 56 (West ed. 1984); Cook, *The Effect of Liquor Taxes on Drinking, Cirrhosis, and Auto Fatalities*, in *Alcohol and Public Policy: Beyond the Shadow of Prohibition* 255 (M. Moore & D. Gerstein eds. 1981); Cook, *Increasing the Federal Alcohol Excise Tax*, in *Toward the Prevention of Alcohol Problems*, *supra*, n. 51, at 24,25; Cook & Tauchen, *The Effect of Liquor Taxes on Heavy Drinking*, 13 *Bell J. Econ.* 379 (1982); Harris, *More Data on Tax Policy*, in *Toward the Prevention of Alcohol Problems* 33; Jacobson & Albion, *Raising Alcohol Taxes is the Way to Cut Drinking and the Debt*, *Washington Post*, Aug. 11, 1985 at L 2, col. 1; Johnson & Oksanen, *Estimation of Demand for Alcoholic Beverages in Canada from Pooled Time Series and Cross Sections*, 50 *Rev. Econ. & Statistics* 113, 117 (1977); Levy and Shefflin, *New Evidence on Controlling Alcohol Use Through Price*, in 44 *J. Studies Alco.* 929 (1983); Mosher & Beauchamp, *Justifying Alcohol Taxes to Public Officials*, *J. Pub. Health Pol.* 422 (1983); National Alcohol Tax Coalition, *Impact of Alcohol Excise Tax Increases on Federal Revenues Alcohol Consumption, and Alcohol Problems* (Sept. 18, 1985) ("National Alcohol Tax Coalition"); Ornstein, *Control of Alcohol Consumption Through Price Increases*, 41 *J. Studies Alco.* 807, 817 (1980); Ornstein & Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 *J. Cons. Research* 200 (1985); S. Ornstein & D. Hanssens, *Retail Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits* (unpublished paper) (available at Graduate School of Management, University of California, Los Angeles); Report of the Panel on Alternative Policies Affecting the Prevention of Alcohol Abuse and Alcoholism, in *Alcohol and Public Policy* 1, 68-73.

supports the conclusion of the Moreland Commission that increasing prices does not promote temperance by reducing liquor consumption.³⁶

More importantly, increasing prices has a significant, and in some cases dramatic, impact on the drinking patterns of two problem groups—youths, who are responsible for a large number of fatal accidents, and heavy drinkers. For example, the recent comprehensive study for the well-respected National Bureau of Economic Research on the sensitivity of alcoholic beverage consumption, particularly excessive consumption, to price among 16 through 21 year olds in the United States concluded that increasing prices would reduce alcoholic beverage consumption among youths.³⁷ Indeed, even small price increases are more effective in reducing consumption among youths than raising the drinking age.³⁸ Price increases affect heavy drinkers as well as light and moderate drinkers.³⁹ Professors Cook and Tauchen have

³⁶ Professor Cook, the leading authority in this field, has concluded that earlier econometric studies of price elasticities in the United States of alcohol employing regression analysis of cross-sectional or time series data were unreliable and he has employed the more reliable "quasi-experimental" approach in his research. Cook, *The Effect of Liquor Taxes*, *supra*, n. 53, at 287. Professor Cook's work has been well-received. Indeed, Professor Robert H. Lee recently reviewed the paper by Cook and Tauchen, *supra*, n. 53, and concluded it was "an important and well-done paper" and that he had "no reservations about the paper." Robert H. Lee, *A Review of "The Effect of Liquor Taxes on Heavy Drinking"* 5 (no date) (unpublished manuscript available at the University of North Carolina, Chapel Hill).

³⁷ Coate & Grossman, *supra*, n. 53, at 26-27. This conclusion is consistent with those of other recent studies. See National Alcohol Tax Coalition, *supra*, n. 53; M. Grossman, D. Coate & G. M. Arluck, *Price Sensitivity of Alcoholic Beverages in the United States*, Conference on Control Issues in Alcohol Abuse Prevention II: Impacting Communities, Charleston, S.C. (Sept. 1984) ("Grossman, Coate & Arluck").

³⁸ Coate and Grossman, *supra*, n. 53, at 26-27, 44; Grossman, Coate & Arluck, *supra*, n. 55, at 27.

³⁹ See, e.g., Coate & Grossman, *supra*, n. 53, at 26-27 (consumption of beer by youths who are frequent drinkers); Grossman, Coate & Arluck, *supra*, n. 55, at 44 ("heavy drinkers and frequent drinkers, who are undoub[t]edly responsible for a large percentage of youth motor vehicles accidents and deaths, also respond to price increases"); Room, *Alcohol Control and Public Health*, 5 *Ann. Rev. Public Health* 293 (1984) (cited in National Tax Coalition, *supra*, n. 53, at 7).

estimated that an increase in the liquor excise tax by one dollar (1967 prices) per proof gallon would reduce the liver cirrhosis mortality rate (a reliable proxy for the prevalence of chronic excess consumption) by 5.4% in the short run and by perhaps twice that amount in the long run. Cook and Tauchen, *supra*, n. 53, at 380. Indeed, even a decline in *per capita* consumption will lead to a decline in consumption by heavy drinkers.²⁸

Widespread recognition price that increases demonstrably reduce alcohol consumption has led to numerous proposals to raise prices by increasing taxes.²⁹ Others have recognized that price increases resulting from other techniques such as minimum markup laws or resale price maintenance affect alcohol consumption.³⁰ The state's wide latitude under the twenty-first amendment permits it to choose a minimum markup instead of a tax increase as a method of raising prices to promote temperance.

C. New York, unlike California in Midcal, also has a strong interest in structuring a liquor distribution system which includes small, neighborhood retailers

In addition to fostering temperance, the New York Legislature was also concerned with preserving a liquor distribution system which included small liquor retailers. Its concern contrasts sharply with California's studied indifference to these issues. In *Midcal*, California, unlike New York, was not acting pursuant to its core powers to promote temperance or protect small retailers. 445 U.S.

²⁸ National Alcohol Tax Coalition, *supra*, n. 53 at 7 (citing 1980 Lancet 1175; Fact Sheets on Sweden, Facts and Figures about Youth in Sweden, FS 88 Ohfb, The Swedish Institute, Stockholm (December 1983)).

²⁹ See, e.g., National Alcohol Tax Coalition 8-12; Grossman, Coate & Arluck 45; Testimony at hearing on excise taxes, Sen. Comm. on Finance, by Michael F. Jacobson, Executive Director, Center for Science in the Public Interest (Apr. 21, 1986).

³⁰ See e.g., Ornstein and Hanssens, *supra*, n. 53, 205, 211 (minimum markup and resale price maintenance laws have identical effects).

at 112-14. It simply authorized private parties to set prices without any state involvement and then, jointly with those private parties, enforced those prices. *Id.* at 105. The California Legislature made no findings that the resale price maintenance was correlated to temperance,³¹ that small retailers were being harmed, or that fair trade laws were necessary for the economic survival of small retailers. See 445 U.S. at 112-14; *Rice*, 21 Cal. 3d at 455-58, 579 P.2d at 493-94, 146 Cal. Rptr. at 601-03. The California agency charged with enforcement of the fair trade law ("ABC Board") "rejected the argument that fair trade laws were necessary to the economic survival of small retailers." *Rice*, 21 Cal. 3d at 456, 579 P.2d at 493, 146 Cal. Rptr. at 602. California expressed no interest in defending the statute. Indeed, the state government was almost unanimously hostile to fair trade laws.³²

New York has a far stronger interest. Its Legislature acted pursuant to its core powers to structure a liquor distribution system which permitted co-existence between small, neighborhood stores and large, discount operations. *J.A.J. Liquor Store*, 64 N.Y.S.2d at 520, 479 N.E.2d at 788, 490 N.Y.S.2d at 152, J.S. 15A (destructive competition threatened survival of the entire retail economy); *House of Spirits v. Doyle*, 72 Misc. 2d at 1039, 339 N.Y.S.2d at 499; Final Report 36. The Senate Excise Committee found that such a law would protect small retailers from the accelerating rate of failures. The appellant's own figures provide dramatic evidence that, contrary to the evidence examined by the California Supreme Court in *Rice* on the effect of resale price

³¹ A recent study has concluded that resale price maintenance laws, by raising prices, reduced consumption of liquor. S. Ornstein & D. Hanssens, *Resale Price Maintenance*, *supra*, n. 53.

³² A state senate committee recommended abolition of resale price maintenance for alcohol. California Senate Select Committee on Laws Relating to Alcoholic Beverages, Report (1974). The ABC Appeals Board invalidated resale price maintenance for distilled spirits and the state's highest court affirmed in *Rice*. The ABC Board declared that resale price maintenance for retail wine sales was invalid in a test case it brought and the state court of appeals agreed. *Capiscean Corp. v. ABC Appeals Board*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), and no state official sought review of either decision. In *Midcal*, the ABC Board again did not appeal to this Court the decision invalidating resale price maintenance at the wholesaler level. 445 U.S. at 111 n.12.

maintenance, adoption of the minimum markup law in 1971 slowed the decline in the number of retail outlets. In 1968, 199 stores failed, in 1969, 242 failed, and 233 failed before the end of 1970. Final Report at 13. From 1971 through 1979, the rate dropped to less than 40% of the 1968-70 failure rate.²² Moreover, the SLA, unlike California's ABC Board, has vigorously defended the statute,²³ and related statutes, see, e.g., *Mezzetti Associates, Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791, 432 N.Y.S.2d 372 (1980), and New York's highest court has concluded that "the State interest in protecting retailers which underlies our statutes is of sufficient magnitude to override the Federal policy expressed in the antitrust laws." *J.A.J. Liquor Store*, 64 N.Y.2d at 522, 479 N.E.2d at 789, 490 N.Y.S.2d at 153, J.S. 17A.

Appellant's contention that § 101-bb(2) is invalid because the state did not adopt the least anticompetitive means, App. Br. 39-42; J.S. 22-24, is erroneous. First, this Court has adopted that test only in cases involving alleged protection of local economic interests against out-of-state commerce, not where the state is simply protecting one segment of a wholly intrastate industry against destructive competition by another.²⁴ Second, this Court did not adopt that requirement in *Midcal*. Although this Court cited *Rice* approvingly, it did not base its decision that California's purported concerns under the twenty-first amendment were not of the same stature as the goals of the Sherman Act on the availability of a less anticompetitive alternative. In any event, the *Rice* court expressly approved of loss leaders and other possible approaches cited in California Dep't of Finance, Program Review Branch, Audits Division, *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies* (1974) ("Alcohol and the State") as less anticompetitive choices. *Rice*, 21 Cal. 3d at 458,

²² According to the figures supplied by the appellant, the number of stores that ceased business in 1971 was 127; in 1972, 110; in 1973, 75; in 1974, 141; in 1975, 24; in 1976, 54; in 1977, 79; in 1978, 128; and in 1979, 64. J.S. 99A.

²³ See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373, 376-77 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 524 (1935).

579 P.2d at 494, 146 Cal. Rptr. at 603. These suggestions included a ten year trial period of high wholesale and retail minimum markups and raising taxes. *Alcohol and the State* 16, 44-45. New York's minimum markup statute, together with Rule 16.4(e), is just such a less anticompetitive choice. Finally, any conflict with the pro-competitive goals of federal antitrust laws is minimal since the minimum markup law advances the equally important Sherman Act goal of protecting small retailers from destructive competition.²⁵

This Court need not decide the scope of the state's core powers under the twenty-first amendment since 101-bb and the Bulletin satisfy the unilateral imposition standards of *Fisher* and are immune under the *Parker* state action doctrine. If "wide latitude" under the amendment has any meaning, it means that 101-bb and Bulletin 471 are within New York's core powers.

²⁵ See n. 21, above at 12.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the New York State Court of Appeals.

Dated: June 27, 1986
New York, New York

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REPLY BRIEF

(11)
No. 84-2022

Supreme Court, U.S.
FILED

OCT 22 1986

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

October Term 1986

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,
v.

THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN AND FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

REPLY BRIEF OF APPELLANT

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Introduction

Appellant previously has demonstrated that because New York Alcoholic Beverage Control Law ("ABC Law") § 101-bb (McKinney 1970 & Supp. 1986) empowers New York wholesalers to dictate retail liquor prices that are enforced (but not reviewed) by the state, under *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), the statute violates the Sherman Act, and is not saved from invalidation by "state action" immunity or § 2 of the Twenty-first Amendment. As is demonstrated below, the arguments of Appellees and various *amici* in response to this showing are without merit.

Argument

I. Section 101-bb On Its Face Authorizes Per Se Violations Of The Sherman Act.

Appellee Commissioners of the New York State Liquor Authority (the "SLA") argue that Section 101-bb should be saved from invalidation because SLA Bulletin 471 is the sole source of the wholesalers' ability to dictate New York retail liquor prices by manipulating the differential between phantom bottle prices and the case prices at which wholesalers actually sell liquor.¹ This argument is directly contradicted by the holding of the New York Court of Appeals that Section 101-bb itself does not link case and bottle prices:

Bulletin 471 allows individual wholesalers to decide whether to "post off" reductions on case prices accompanied by corresponding reductions in bottle

¹ SLA Br. at 1-6. Bulletin 471 expressly authorizes a wholesaler who posts off a case price (see p. 2n.2, *infra*) to (1) reduce the bottle price proportionately, (2) reduce the bottle price by some lesser amount, or (3) not reduce the bottle price at all. JS at 71A-73A; see 324 Br. at 7-8.

prices. In some situations, the wholesaler may choose to grant a smaller price reduction on the bottle price, or no reduction at all. *This practice is consistent with ABC Law § 101-b(3) which does not mandate any price ratio between scheduled case and bottle prices.*

JS at 18A (emphasis added). This recognition by New York's highest court that ABC Law § 101-b "does not mandate any price ratio between scheduled case and bottle prices" necessarily applies to Section 101-bb, which uses the bottle price established by the wholesaler under § 101-b as the base for computing the minimum retail price.²

Appellees argue that the wholesaler is only "permitted to determine a component of the retail price, but not the entire price." SLA Br. at 6 (emphasis added). Appellees concede, however, that the bottle price "forms the base for the statutory minimum markup." *Id.* This concession is fatal to Appellees' argument. The unfet-

2 Appellees rely on SLA Rule 16.4(e) in an attempt to avoid the clear holding of New York's highest court below. Rule 16.4(e) provides that the "bottle price" multiplied by the number of bottles in a case "must exceed the case price by [a 'breakage surcharge' of] approximately \$1.92." JS at 70A. Appellees' argument ignores the crucial distinction between "legal" and "post off" prices under New York law. See 324 Br. at 5-8. While Rule 16.4(e) deals with the relationship between "legal" case and bottle prices, the transactions at issue occurred during "post offs." *Id.* at 5-6. Since 1973, the SLA through Bulletin 471 has established that when a wholesaler posts off its case price in a given month, it need make no corresponding reduction in its bottle price. *Id.* at 7-8. Thus, while counsel for Appellees now argue that SLA Rule 16.4(e) should govern post offs, the SLA for the past 13 years has ruled in Bulletin 471 that no such correlation is required. Moreover, the holding of New York's highest court below that Section 101-bb does not require a relationship between case and bottle prices calls into question the continued validity of Rule 16.4(e) under New York law. The invalidation of Bulletin 471 alone, therefore, could well leave wholesalers free to continue manipulating the differential between case and bottle prices.

tered control that New York affords wholesalers over this "base"—the only variable component — constitutes control over the "entire" minimum retail price.³ Thus, Section 101-bb, like the California statute invalidated in *Midcal*, does nothing more than "cast[] a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."⁴

The record in this case amply demonstrates that wholesaler domination of the "base" is control over the "entire" retail price. In the specific transactions at issue here, wholesalers set their bottle prices at levels such that Appellant was held to have violated a statute which purportedly establishes a 12 percent markup, even though Appellant sold liquor at retail prices which yielded actual markups in excess of 18 percent.⁵ Furthermore, Section 101-bb(2) stipulates that the wholesaler's bottle price "in

3 As a practical matter, § 101-b and Bulletin 471 do not limit the wholesaler's ability to control retail prices. The limitations described by Appellees (SLA Br. at 3, 26) apply to "legal" prices, not post offs. See p. 2n.2, *supra*.

4 *Midcal*, 445 U.S. at 106. Under the statute challenged in *Midcal*, a California wine producer could establish a resale price to consumers of \$11.20 per bottle through a fair trade contract or, in the absence thereof, a wine producer or wine wholesaler could establish the same price by posting \$11.20 as the resale price to consumers in a schedule filed with the California liquor control board. See *id.* at 99-100 & n.1. A New York wholesaler can similarly establish a minimum retail price to consumers of \$11.20 merely by setting the bottle price at \$10.00 in the schedule it files with the SLA. To increase the retailer's minimum price to \$11.76, the wholesaler need only raise the bottle price in his schedule to \$10.50. See 324 Br. at 6-9, 11-12 & nn.13-14. As in the California statute invalidated in *Midcal* (see 445 U.S. at 99n.1), under Section 101-bb the New York wholesaler includes the minimum resale price to consumers on the price schedule it files with the SLA. See JA at 16-17, 36-37.

5 324 Br. at 12 & nn.13-14. Under Section 101-bb, New York liquor wholesalers advertise regularly in trade journals that they have set minimum resale prices at levels that guarantee retailers returns of 20 to in excess of 30 percent over actual cost. JA at 23-27, 32-35; JS at 100A-101A.

effect at the time" of the retail sale serves as the base for computing the retailer's minimum resale price, irrespective of whether the retailer purchased the item when a lower price was in effect.⁶ Thus, wholesalers are able to guarantee retailers profits in excess of 30 percent by manipulating the minimum resale price from month to month: the wholesaler establishes prices at a certain level in one month, and announces in trade journal advertisements that for the next month it will set the minimum resale price at a substantially higher level.⁷

6 The SLA does not attribute this constitutional infirmity to an administrative regulation, nor can it. Section 101-bb contains the defect on its face; neither Bulletin 471 nor Rule 16.4(e) addresses the matter.

7 JS at 101A. Section 101-bb's use of the currently posted bottle price cannot be justified on the ground that "replacement cost" serves as a proxy for "invoice cost" in order to expedite enforcement. Other state minimum markup statutes exist that do not give private parties the power to control resale prices or to confer supracompetitive profits upon retailers. Thirty of these statutes contain the following important safeguards not present in Section 101-bb: statutory cost is defined in terms of invoice or replacement cost, whichever is lower; and the minimum markup to statutory cost is inapplicable if a lesser overhead cost is proven. See: (1) all products: Cal. Bus. & Prof. Code §§ 17026, 17026.5, 17029-17030, 17043-17045, 17071-17074, 17077 (Deering 1976 & Supp. 1986); Idaho Code § 48-401 et seq. (1977); La. Rev. Stat. Ann. §§ 51:421 to 51:423 (West 1965); Me. Rev. Stat. Ann. tit. 10, § 1202 et seq. (1964); Md. Com. Law Code Ann. § 11-401 et seq. (1983); Mass. Ann. Laws ch. 93, §§ 14E-14G (Law. Co-op. 1985); Pa. Stat. Ann. tit. 73, § 212 et seq. (Purdon 1971); R.I. Gen. Laws § 6-13-1 et seq. (1985); Tenn. Code Ann. § 47-25-201 et seq. (1984); Utah Code Ann. § 13-5-7 et seq. (1973); Va. Code Ann. § 59.1 et seq. (Supp. 1986); W. Va. Code § 47-11A-1 et seq. (1980); Wis. Stat. Ann. §§ 100.30, 100.201 (West 1973 & Supp. 1986); (2) cigarettes: Ark. Stat. Ann. § 70-601 et seq. (1979); Del. Code Ann. tit. 6, §§ 2601-2606 (Supp. 1985); Ind. Code Ann. § 24-3-2-1 et seq. (Burns 1982 & Supp.

(Continued on following page)

For these reasons, Section 101-bb (with or without Bulletin 471) confers upon liquor wholesalers "vertical control" over liquor prices which "destroys horizontal competition as effectively as if [retailers] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'"⁸ *Midcal* requires no more to establish that a challenged statute violates Section 1 of the Sherman Act.⁹

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1986); Iowa Code Ann. § 551A.1 et seq. (West 1950 & Supp. 1986); Ky. Rev. Stat. Ann. § 365.270 et seq. (Michie/Bobbs-Merrill Supp. 1986); Md. Com. Law Code Ann. § 11-501 et seq. (1983); Mass. Ann. Laws ch. 64c, §§ 12-16, 20 (Law. Co-op. 1978); Miss. Code Ann. § 75-23-1 et seq. (1972); Mont. Code Ann. § 16-10-103 et seq. (1985); Neb. Rev. Stat. § 59-1501 et seq. (1984); N.J. Stat. Ann. §§ 56:7-19 to 56:7-30 (West 1964 & Supp. 1986); N.Y. Tax Law §§ 483-486 (McKinney Supp. 1986); Ohio Rev. Code Ann. §§ 1333.11-1333.19 (Page 1979); Okla. Stat. Ann. tit. 68, § 327 et seq. (West Supp. 1985); Pa. Stat. Ann. tit. 73, § 231.1 et seq. (Purdon 1971); Tenn. Code Ann. § 47-25-301 et seq. (1984 & Supp. 1986); Wash. Rev. Code Ann. § 19.91.010 et seq. (1978 & Supp. 1986).

8 *Midcal*, 445 U.S. at 103 (quoting *Dr. Miles Medical Co. v. John D. Park & Sons, Inc.*, 220 U.S. 373, 406 (1911)).

9 *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), is not to the contrary. That case involved a challenge to a California statute permitting brand owners to designate approved liquor importers, while prohibiting other importers from handling the owner's distilled spirits. The Court held

that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

Id. at 661 (emphasis added). The Court stressed that this stringent requirement of irreconcilable conflict in all hypothetical applications existed because an injunction was sought against enforcement of a statute that had never been implemented. *Id.* at 658n.4, 660n.6, 662n.7. The Court also recognized that the challenged statute "cannot be condemned in the abstract" since it had to be "analyzed under the rule of reason." *Id.* at

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II. Section 101-bb Satisfies The Sherman Act's Concerted Action Requirement.

The claim by Appellees that Section 101-bb does not involve a contract, combination or conspiracy in restraint of trade cannot withstand scrutiny. Section 101-bb involves a "combination" in restraint of trade because the New York statute provides for state enforcement of a minimum markup over prices dictated by private parties.

Under *Midcal*, the statutorily-conferred ability of private parties to dictate resale prices to consumers by posting price schedules, coupled with state enforcement of such privately-determined prices, constitutes a Sherman Act combination.¹⁰ An illegal "hybrid" restraint is present where, as here, both private price fixing and state enforcement occur. *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986) (discussed in 324 Br. at 22-23).

Appellees miss the mark in their attempt to equate Section 101-bb with the Berkeley ordinance at issue in *Fisher* on the ground that each involved prices which included a privately-determined component. SLA Br. at 19-20. In *Fisher*, the Court recognized that whether a restraint is "hybrid" or purely governmental turns entirely on whether "[p]rivate actors are thus granted 'a degree of private regulatory power'" over prices. 106 S. Ct. at 1050. In upholding the Berkeley ordinance, there was no

(Continued from previous page)

661. By contrast, Appellant seeks to annul an Order of Suspension entered under a statute that has been in operation for 15 years; and because Section 101-bb authorizes *per se* violations of the Sherman Act, this case is controlled not by *Norman Williams*, but by *Midcal*.

10 445 U.S. at 99, 102-03. See also *Norman Williams*, 458 U.S. at 659 (*Midcal* involved a "statute [that facially] conflicted with the Sherman Act because it mandated resale price maintenance") (emphasis in original).

reason for the Court to be concerned about how pre-control rent levels had been set: under the ordinance, private parties in the future could not change those pre-existing levels and thereby control subsequent rent increases. By contrast, under Section 101-bb wholesalers maintain ongoing control of the bottle price and thereby control future resale prices.¹¹

Appellees cannot establish that Section 101-bb is a purely governmental restraint merely by showing that the state enforces (but does not supervise the setting of) retail liquor prices. "[T]he mere existence of legal compulsion" is not enough to turn a state statute "into unilateral action by the State." *Fisher*, 106 S. Ct. at 1051; accord *Midcal*, 445 U.S. at 105-06 (state "enforce[ment of] the prices established by private parties" is not enough to save challenged statute).

Unable to persuasively dispute the finding of New York's highest court that retail "[l]iquor prices are set by the wholesalers and the State has no power to change the prices or review their reasonableness" (JS at 10A), Appellees seek refuge under *Hoover v. Ronwin*, 466 U.S.

11 See pp. 2-4, *supra*. The Court's refusal in *Fisher* to find a conspiracy "between the government and those who must obey its regulatory commands" (106 S. Ct. at 1049-50) does not apply to this case. The illegal combination here involves retailers who are required by the state to sell at resale prices determined by wholesalers. See *Midcal*, 445 U.S. at 103, 105-06; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386, 389 (1951); cf. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43, 44 (1960).

558 (1984). Because the instant case involves a "private price-fixing arrangement authorized by [the] State" rather than one in which "the conduct at issue is in fact that of the state legislature or supreme court" (*id.* at 568-69), the instant case is controlled by *Midcal* rather than *Ronwin*.¹²

III. The Twenty-First Amendment Does Not Immunize Section 101-bb From Attack Under The Federal Anti-trust Laws.

Under *Midcal*, the profound federal interest in a competitive economy is outweighed, if ever,¹³ only when a challenged statute demonstrably serves state concerns at

¹² See 324 Br. at 32-33. Court precedents establish that "state action" immunity is not available where, as here, "[t]he State simply authorizes price setting and enforces the prices established by private parties." *Midcal*, 445 U.S. at 105; accord *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (no state action where a state enforcing agency "has voluntarily joined in what is essentially a private anticompetitive activity"); see 324 Br. at 30-33. The Legislature's constructive "ratification" of Bulletin 471 (SLA Br. at 32-33) is not the kind of active supervision of private price-setting contemplated under the Court's "state action" precedents. Compare *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1724 (1985) (state agency empowered to approve, reject, or modify privately-established collective rates).

¹³ The Court frequently has struck down state liquor statutes that were found to sanction resale price maintenance or otherwise conflict with federal law, even though those statutes were defended under the Twenty-first Amendment. *Midcal*, 445 U.S. at 106-14; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711-16 (1984); cases cited in SLA Br. at 38.

the core of the Twenty-first Amendment.¹⁴ Appellees can make no such showing here.

The newly minted argument by Appellees that Section 101-bb was designed to reduce liquor consumption through higher retail prices was not relied upon by the court below in upholding the statute under the Twenty-first Amendment.¹⁵ New York cannot demonstrate that the Legislature adopted Section 101-bb to raise liquor prices and thereby promote temperance.¹⁶ Nor do the materials

¹⁴ 445 U.S. at 114. Appellees and some amici wrongly suggest that the "free enterprise concept is displaced" because New York regulates alcoholic beverages under the Twenty-first Amendment. Ret. Br. at 16-17; see SLA Br. at 34. The Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"; however, "other liquor regulations" (such as statutes sanctioning resale price maintenance) are "subject to the federal commerce power." *Midcal*, 445 U.S. at 110.

¹⁵ The Court of Appeals did not mention reduction of liquor consumption as a statutory objective, nor did it find that Section 101-bb promotes temperance. See JS at 13A-17A. Instead, New York's highest court stated that Section 101-bb was intended to prevent the ultimate concentration of the retail liquor business in the hands of a relatively few large sellers who "could then dictate prices to the ultimate injury of consumers." JS at 15A. Appellees' temperance argument cannot survive this conclusion of New York's highest court. If Section 101-bb was designed to prevent high retail prices—as the Court of Appeals found—then it could not have been intended to produce high retail prices. See 324 Br. at 42-46.

¹⁶ The New York Senate Excise Committee—after expressing concern that predatory practices and low prices were causing a decline in the number of retail liquor stores—stated that the objective of the 1971 revision to Section 101-bb was to shield small liquor retailers from "destructive" price competition and to prevent "monopolistic concentration of volume in the hands of a relatively few stores." N.Y. Sen. Excise Comm., Final Report 36 (March 1971) ("Report"). In contrast, the Excise Committee did not "squarely reject the Moreland Commission's conclusions" as to the absence of any direct relationship between liquor prices and consumption. SLA Br. at 39. Instead, it was stated that:

lodged with the Court by Appellees establish that "there is a significant correlation between increasing prices and decreasing [liquor] consumption."¹⁷

(Continued from previous page)

because of the multiplicity of factors involved and lack of data on specifics, the Committee is unable to determine what portion of [the] increase [of alcoholic consumption in the period of 1964-71] is attributable to any particular factors.

Report at 14. Indeed, the Committee found that "consumers' choice is not always dictated by price, whim, or even casual convenience." *Id.* at 30. It was also noted that the ability of consumers from states bordering on New York (i.e., Connecticut, Massachusetts, New Jersey, Pennsylvania and Vermont, as well as Canada) to cross into New York and purchase liquor had to be considered in assessing the significance of the pre-1971 per capita increase in New York liquor consumption; thus, the Committee concluded that this increase "is lowered by the fact that residents of neighboring states are now purchasing liquor in New York because of low prices." *Id.* at 7. The studies lodged with the Court by Appellees also recognize the difficulties that border crossing consumers pose for analyses of the relationship, if any, between alcohol consumption and liquor prices. See, e.g., Grossman, Coate & Arluck, *Price Sensitivity of Alcoholic Beverages in the United States*, 8, Conference on Control Issues in Alcoholic Abuse Prevention II: Impacting Communities (Sept. 1984); Ornstein & Hanssens, *Alcoholic Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Cons. Research 200, 203 (1985); Coate & Grossman, *Effects of Alcoholic Beverage Prices and Legal Drinking Ages on Youth Alcohol Use*, National Bureau of Economic Research, Working Paper No. 1852 at 12 (March 1986).

17 SLA Br. at 40. To the contrary, at least two post-Moreland Commission studies not cited by Appellees have found that price increases have "negligible" or even positive effects on liquor consumption. See Wales, *Distilled Spirits and Interstate Consumption*, 58 Am. Econ. Rev. 853, 858-59 (1968) ("the negligible value of the price coefficient . . . implies that the elasticity of the individual's consumption with respect to price will be approximately zero"); H.S. Houthakker & L.D. Taylor, *Consumer Demand in the United States, 1929-1970* at 60 (Harv. Univ. Press 1966) ("own-price elasticity [for alcoholic beverages] was positive") (copies of both studies lodged with the

(Continued on following page)

Had the New York Legislature intended in 1971 to promote temperance through higher prices, it would not in Section 101-bb have given control over the resale price of specific liquor brands to individual wholesalers who have no incentive to encourage temperance. Instead, the Legislature itself would have increased state taxes on all liquor or established direct state control of liquor pricing (through state-owned liquor stores or otherwise).¹⁸

Indeed, New York has no unambiguous and clearly articulated state policy to reduce liquor consumption by

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Court by Appellant). Moreover, several of the studies lodged with the Court by Appellees caution that the reliability of U.S. liquor consumption analyses is severely limited, since the available data is inadequate. E.g., Cook, *The Effect of Liquor Taxes on Drinking, Cirrhosis, and Auto Fatalities*, in *Alcohol and Public Policy: Beyond the Shadow of Prohibition* 255, 265, 267 (M. Moore & D. Gerstein eds. 1981); Grossman, Coate & Arluck, *Price Sensitivity of Alcoholic Beverages in the United States*, *supra*, at 8-9; Ornstein, *Control of Alcohol Consumption through Price Increases*, 41 J. Studies Alco. 807, 817 (1980). This unreliability is underscored by the fact that the studies cited by Appellees have produced no consensus regarding the sensitivity of liquor consumption to price increases. National Alcohol Tax Coalition, *Impact of Alcohol Excise Tax Increases on Federal Revenues, Alcohol Consumption, and Alcohol Problems* at 6 (Sept. 18, 1985).

18 It is not dispositive that Section 101-bb(1) states that the Legislature acted "for the purpose of fostering and promoting temperance." JS at 64A. The California Supreme Court—in an opinion cited with approval by the Court in *Midcal*—rejected Twenty-first Amendment immunity for a resale price maintenance scheme despite a strong legislative declaration that a state statute was intended to encourage temperance. *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 451 & n.13, 456, 457-58, 579 P.2d 476, 490 & n.13, 493, 494, 146 Cal. Rptr. 585, 599 & n.13, 601, 603 (1978) ("we find that the policies underlying the Sherman Act are clearly violated by the liquor price maintenance laws, and that . . . there is doubt whether such laws promote temperance").

raising retail liquor prices. New York has enacted no provision to discourage beer consumption.¹⁹ While claiming here that vertical price fixing by private parties promotes temperance, New York's Attorney General recently instituted a Sherman Act attack upon various national brewers, alleging that their exclusive territorial arrangements produced higher beer prices to the detriment of New York consumers.²⁰ In addition, the Legislature has enacted statutes designed not to reduce consumption.²¹ Such selective pursuit diminishes the objective of promoting temperance under the Twenty-first Amendment where, as here, there is a conflict between state and federal law. *Capital Cities*, 467 U.S. at 715 (rejecting temperance argument because "Oklahoma has chosen not to

19 Nor does New York seek to promote temperance through higher wine prices. A New York statute that authorized private parties (brand owners or wine wholesalers) to fix minimum consumer resale prices (ABC Law § 101-bbb) was invalidated by the Court of Appeals shortly after *Midcal*. See *Mezzetti Associates, Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791, 432 N.Y.S.2d 372 (1980). New York has not replaced this statute in the intervening six years.

20 *New York v. Anheuser-Busch, Inc.*, CV-86-2345 (E.D. N.Y. July 15, 1986), Complaint ¶¶ 47, 56 (copy lodged with Court by Appellant).

21 New York sought "low prices for its residents" through the manufacturer price affirmation provision invalidated in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2086 (1986); accord *id.* at 2089, 2090 (Stevens, J. dissenting). Moreover, New York recently enacted a law that permits customers to use credit cards in purchasing wine and liquor at retail liquor stores. Act of August 2, 1986, ch. 797, 1986 N.Y. Laws (copy lodged with Court by Appellant). This new law displaces a ban on the use of consumer credit in the retail sale of liquor for off-premise consumption that had existed since Prohibition was repealed. *The New York Times*, August 8, 1986 at p. B2, col. 5.

press its campaign against alcoholic beverage advertising on all fronts").²²

Appellees argue further that because Section 101-bb was intended to preserve small liquor retailers, it is immunized under the Twenty-first Amendment. The challenged statute, in fact, has not served this purpose.²³ Moreover, to the extent that Section 101-bb attempts to preserve small retailers, it does so by authorizing New York wholesalers in their unfettered discretion to eliminate retail price competition and to assure liquor retailers of markups as high as 30 percent or more. See pp. 3-4, *supra*. Such a blatantly anticompetitive measure goes far beyond what is necessary to stop possible predation by certain liquor retailers.²⁴

22 The liquor pricing studies lodged with the Court by Appellees state categorically that any public policy of discouraging liquor consumption through high prices must apply across-the-board to other types of alcoholic beverages. E.g., Levy & Sheflin, *New Evidence on Controlling Alcohol Use Through Price*, 44 J. Studies Alco. 929, 931 (1983) ("[a] policy directed at the consumption of one beverage category may lead to offsetting increases in the consumption of another category").

23 Only last month, it was reported that the number of retail liquor stores in New York had decreased since 1981 from 4,098 to only 3,019 (as of July 31, 1986), with over 359 licensees going out of business since February. *Licensed Beverage Journal* at 1 (September 5, 1986). These precipitous declines dwarf those that so alarmed the Senate Excise Committee in 1971. See Report at 13 (noting declines of 199 stores in 1968, 242 in 1969, and 233 in 1970). Indeed, the number of retail liquor stores reportedly operating in New York at the end of 1971 (in excess of 5,000) was far larger than today. See JS at 99A.

24 324 Br. at 39-42; see pp. 4-5n.7, *supra*. Any concern about predation is economically irrational in that New York limits retailers to operation of a single location, ABC Law § 63 (McKinney 1970 & Supp. 1986). See 324 Br. at 28-29. Nor will invalidating Section 101-bb lead to an outbreak of unfair competition, as Appellees and certain amici claim. SLA Br. at 44; Ret. Br. at 15-16. Various ABC Law provisions protect small retailers by barring discrimination in prices or discounts, specifying

Finally, any legitimate interest that New York might have in protecting small retailers is vitiated inasmuch as the challenged statute grants private parties absolute discretion to confer supracompetitive profits upon retailers. Because Section 101-bb is nothing more than a "frontal assault" upon Sherman Act policies,²⁵ this state statute cannot "prevail against the undoubted federal interest in a competitive economy."²⁶

Conclusion

For the reasons set forth above, the decision herein should be reversed with directions to grant Appellant's petition and annul the SLA's Order of Suspension dated November 12, 1982 on the ground that Section 101-bb and Bulletin 471 are invalid under the Supremacy Clause as in conflict with Section 1 of the Sherman Act.

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Dated: October 22, 1986

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maximum allowable discounts, prohibiting wholesalers from granting free merchandise or other inducements, and limiting the credit period afforded to retailers by wholesalers. ABC Law §§ 101-b(2)(a) & (b), 101-a(2).

²⁵ *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

²⁶ *Midcal*, 445 U.S. at 114. It is not a distinction of constitutional dimension that in *Midcal* state officials had refused to defend California's blatantly illegal statute, while Appellees seek to preserve New York's more cleverly disguised analogue (SLA Br. at 36n.48).

AMICUS CURIAE

BRIEF

In the Supreme Court of the United States
OCTOBER TERM, 1985

**324 LIQUOR CORP., d/b/a YORKSHIRE WINE
& SPIRITS, APPELLANT**

v.

THOMAS DUFFY, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANT**

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QUESTIONS PRESENTED

1. Whether New York State's Alcoholic Beverage Control Law § 101-bb (McKinney 1970 & Supp. 1986) is inconsistent with the Sherman Act.
2. Whether the state action doctrine immunizes the statutory scheme from Sherman Act challenge.
3. Whether Section 2 of the Twenty-first Amendment immunizes the statutory scheme from Sherman Act challenge.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2022

324 LIQUOR CORP., d/b/a YORKSHIRE WINE
& SPIRITS, APPELLANT

v.

THOMAS DUFFY, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANT

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the federal antitrust laws and therefore has a substantial interest in assuring that those laws are construed in a manner that advances their objectives. At the Court's invitation, the United States filed a brief at the jurisdiction stage of this case.

STATEMENT

1. Section 101-b(3) of the New York Alcoholic Beverage Control Law (ABC Law) (N.Y. Alco. Bev. Cont. Law (McKinney 1970 & Supp. 1986)) [here-

(1)

inafter all references are to 1970 & Supp. 1986] regulates wholesale liquor pricing (J.S. App. 67A). It requires manufacturers and wholesalers of liquor to file monthly schedules containing their prices, per case and per bottle, for every item sold to retailers (*ibid.*).¹ The statute does not prescribe wholesale prices; it simply requires that prices be posted monthly and adhered to during the following month (*id.* at 6A-7A).

The statute does not itself require the wholesaler's bottle price to bear any direct relation to the wholesaler's case price. However, the State Liquor Authority (SLA) has promulgated Rule 16.4(e), which provides a formula for computing a bottle price (N.Y. Admin. Code tit. IX, § 65.4(e) (Supp. 1986); J.S. App. 70A). For cases of 48 bottles or less, the formula requires the posted bottle price, multiplied by the number of bottles per case, to exceed the case price by a breakage charge of \$1.92 (*ibid.*).

ABC Law § 101-bb(2) governs retail liquor prices (J.S. App. 64A-65A). It prohibits retailers from selling any item at less than "cost." "Cost" is defined not as the retailer's actual cost but as the wholesaler's posted "bottle price" in effect at the time the retail sale is made (which may be higher or lower than the price in effect when the retailer purchased), plus a 12% markup (*ibid.*).

¹ The schedule must be filed with the State Liquor Authority (SLA) by the fifth day of the month preceding the month in which the schedule is to take effect (ABC Law § 101-b(4); J.S. App. 68A). The SLA must make all schedules available for inspection by other wholesalers as well as the general public (*id.* at 68A-69A). Wholesalers have three days after inspection to amend their schedules to meet (but not beat) the prices of competing wholesalers (*id.* at 68A).

The wholesaler's posted "legal" prices are ceiling prices (J.S. App. 7A). Once a schedule of "legal" prices is filed, the statute prohibits a wholesaler from raising any price above the posted legal price in succeeding months, except to reflect increases in its suppliers' prices, and requires prices to be reduced to reflect any reductions in a wholesaler's costs.² Wholesalers may, however, reduce—or "post-off"—prices as a temporary sale (*ibid.*). "Post-off" prices must appear on the monthly price schedules and become the effective prices charged to all customers during that month (see J.S. App. 87A, 88A; see also *id.* at 7A).

When a wholesaler temporarily posts-off the case price of an item, it is not required to reduce the bottle price for that item as well. Under New York SLA Bulletin 471 (June 29, 1983) (J.S. App. 71A), a wholesaler offering a post-off case price has the option of (1) not reducing the bottle price at all (in which case the "legal" bottle price remains the basis for the 12% markup), (2) reducing the bottle price to correspond to the reduced case price, or (3) reducing the bottle price by a lesser amount.³

² ABC Law § 101-b(3) (b); J.S. App. 68A.

³ Rule 16.4(e) states that "[v]ariations [from the bottle price formula] will not be permitted without approval of the [State Liquor] [A]uthority." N.Y. Admin. Code tit. IX, § 65.4(e) (Supp. 1986). J.S. App. 70A. Bulletin 471, which authorizes bottle prices that have no direct relationship to the case price, may be viewed as the requisite SLA "approval" for deviations from Rule 16.4. See R. 71. The New York Court of Appeals did not discuss Rule 16.4 or its relationship to Bulletin 471. The court did conclude, however, that Bulletin 471 is consistent with the statute since Section 101-b(3) does not "mandate any price ratio between scheduled case and bottle prices" (J.S. App. 18A). That interpretation of the

The effect of these various requirements is to permit a wholesaler to fix its retailers' "costs," below which they are not permitted to sell, at an amount substantially and arbitrarily higher than the price the retailers actually pay plus the statutory markup. First, the wholesaler's case price (at which retailers generally buy) may be lower when the retailers stock up than at the later time when the retailers sell. Second, and more important, Bulletin 471 permits wholesalers to reduce case prices to retailers without reducing posted bottle prices and thus to prevent retailers from reflecting some or all of their savings in reduced retail prices (see J.S. App. 5A).⁴

2. Appellant, a retail liquor store in New York, sold liquor to state investigators at prices more than 12% above the wholesale case price then in effect (J.S. 7-8 & nn. 8-9), but was nevertheless found guilty by the SLA of violating ABC Law § 101-bb by selling liquor at a price lower than its statutorily defined cost based on the posted bottle price (J.S. App. 4A, 77A-79A). Appellant sought to annul the determination on the ground, inter alia, that Section 101-bb constitutes a resale price maintenance scheme inconsistent with the federal antitrust laws (J.A.

statute by the highest state court is binding on this Court. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

⁴ The sample schedules in the record (J.A. 16-17, 36-37) indicate that the bottle prices for some post-off items are reduced to the full extent permitted by the Rule 16.4 formula. For many other items, however, the wholesaler has posted a bottle price that reflects none or only part of the reduction in the case price.

12).⁵ The SLA argued that the statutory scheme does not violate the Sherman Act because the minimum markup price provisions do not compel concerted anticompetitive activity. It further argued that the statute is immune from Sherman Act challenge under the "state action" doctrine (see *Parker v. Brown*, 317 U.S. 341 (1943)) and under the Twenty-first Amendment (J.S. App. 5A).

3. The New York Court of Appeals rejected the SLA's claims that the statute is immune from Sherman Act challenge under the state action doctrine of *Parker v. Brown*, *supra*, finding that here, as in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), there was insufficient active state supervision of the resale price maintenance system for it to constitute state action (J.S. App. 9A-10A). The court concluded, however, that the statute was shielded from antitrust challenge by the Twenty-first Amendment, because "the state interest in protecting retailers which underlies [the ABC Law] is of sufficient magnitude to override the federal policy expressed in the antitrust laws" (J.S. App. 17A). The court also concluded that, in any event, the statute did not violate the Sherman Act because "the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with the federal statutes" (*ibid.*). Judge Jasen filed a separate opinion, concurring in the majority's conclusions that the New York statute is consistent with the federal antitrust laws and that it is shielded by the Twenty-first Amendment, but dis-

⁵ Appellant also contended that the SLA exceeded its authority in promulgating Rule 16.4 and in issuing Bulletin 471 (J.A. 11-12).

agreeing with the majority's holding that the statute does not qualify for the state action defense (J.S. App. 19A).

One judge dissented. Judge Kaye would have rejected the Twenty-first Amendment defense on the ground that the state policy asserted in defense of the liquor regulation—maintenance of an orderly market for alcoholic beverages—lacked a substantial basis (J.S. App. 27A). Judge Kaye also would have invalidated the statute as violative of the Sherman Act. He reasoned that “[e]ven if the pricing scheme could be upheld as furthering a State policy to protect small retailers against *unfair* competition, it goes well beyond, and by fixing minimum resale prices effectively and unnecessarily forecloses *all* competition” (*ibid.* (emphasis in original)).

SUMMARY OF ARGUMENT

The New York statute creates a resale price maintenance scheme: it permits wholesalers, by posting bottle prices, to set prices below which retailers may not lawfully sell. The New York scheme cannot be meaningfully distinguished from the statutory pricing scheme that this Court held invalid under the Sherman Act in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*.

Contrary to the view of the state court, the New York scheme cannot be justified, as an antitrust matter, on the ground that it shelters small retailers from price competition. The purpose of the antitrust laws is “the protection of *competition*, not *competitors*.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original). A policy of “stabilizing the retail market and protecting the economic position of small liquor retailers” (J.S. App. 15A) is “nothing less than a frontal

assault on the basic policy of the Sherman Act.” *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

The New York Court of Appeals correctly applied the two-part *Midcal* test and rejected the state action defense. That test requires both an unambiguous state policy and active supervision by the state (445 U.S. at 105). Although the first part of the test is satisfied here because the State has a clearly articulated intention to displace competition with regulation of retail liquor pricing, the statute fails the second part of the test: since the lawful retail price depends on the wholesaler's “bottle” price, which need not bear any relation to the case price at which the wholesaler actually sells, the statute gives liquor wholesalers broad, unsupervised discretion to determine minimum retail prices and profit margins.

The New York court erred in concluding that the Twenty-first Amendment shields the state statute. The state interests asserted here are plainly not “core” interests protected by that Amendment and will not withstand the “careful scrutiny” required by *Midcal*, 445 U.S. at 110. The suggestion of a state interest in protecting small retailers against predatory pricing is unsupported by evidence, implausible, and in any event cannot justify a scheme that enables wholesalers to dictate retail prices substantially above the retailer's cost. The state's interest in protecting small retailers from lawful competition is directly contrary to, and cannot prevail against, the strong federal interest in competition embodied in the antitrust laws.

ARGUMENT

I. NEW YORK'S STATUTORY PRICE MAINTENANCE SCHEME IS INCONSISTENT WITH THE SHERMAN ACT

The "threshold question" is whether New York's pricing plan for liquor conflicts with the Sherman Act (*California Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. at 102). The court of appeals asserted that "the state policy of regulating prices to protect consumers and maintain extensive retail outlets is consistent with the federal [antitrust] statutes" (J.S. App. 17A). The court did not offer any legal analysis or support for this position, but it apparently believed that "stabilizing the retail market and protecting the economic position of small liquor retailers" (*id.* at 15A) are procompetitive goals. As this Court has emphasized, however, the purpose of the antitrust laws is "the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted; emphasis in original).⁶ The antitrust laws seek to enhance the welfare of consumers (*Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)), whose interests are served by competition, not by protecting small retailers against its effects.

An industry-wide system of resale price maintenance mandated by statute is inherently anticompetitive. The New York scheme of resale price maintenance precludes all manufacturers and wholesalers

⁶ The appellees assert that Section 101-bb does not conflict with the Sherman Act because its aim is to "preserve competition" by "protect[ing] the retail liquor market from the predatory practices of large retailers" (Mot. to Dis. or Aff. 4). This is incorrect. See pages 22-23, *infra*; J.S. App. 27A (Judge Kaye dissenting).

from pursuing a strategy involving price competition among their dealers.⁷ It therefore denies consumers the benefits of competition among manufacturers and wholesalers free to formulate their marketing strategies in light of their perceptions of consumer needs and preferences.⁸ It protects only the interests of retailers preferring to avoid vigorous price competition—to the detriment of consumers. Moreover, as this Court has observed, imposition of resale price maintenance on an industrywide basis may facilitate cartelization. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).

The state court's conclusion that New York's "system of price maintenance" (J.S. App. 10A) is consistent with the Sherman Act ignores the clear holdings of this Court to the contrary. Although commentators have debated the merits of a rule outlawing all resale price maintenance agreements,⁹ this

⁷ In contrast, a vertical restraint unilaterally imposed by a manufacturer or wholesaler may be part of a marketing strategy intended to make it a more effective competitor. It leaves other manufacturers or wholesalers free to make their own judgments about how best to compete for the favor of consumers—either adopting or not adopting their own vertical restraints. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-763 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-56 (1977).

⁸ See R. Bork, *The Antitrust Paradox* 289-290 (1978); Marvel & McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J. L. & Econ. 363, 374, 377 (1985).

⁹ See, e.g., Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & Econ. 86 (1960); R. Posner, *Antitrust Law, an Economic Perspective* 147ff, 165-166 (1976); R. Bork, *supra*, at 290-298; Goldberg, *The Free Rider Problem, Imperfect Pricing, and The Economics of Retailing Services*, 79 Nw. U.L. Rev. 736 (1984); Marvel & McCafferty, *The*

Court has not departed from the view that vertical price-fixing is illegal per se under the federal anti-trust laws. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 408-409 (1911); see *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. at 761 & n.7. In *Midcal*, the Court ruled that a statutory scheme requiring wine producers and wholesalers to file fair trade contracts or schedules that establish binding resale prices "plainly constitutes resale price maintenance in violation of the Sherman Act" (445 U.S. at 99, 103).

New York's retail liquor pricing scheme is not materially different from the system condemned in *Midcal*: New York wholesalers post prices that determine their customers' minimum resale prices. As the responsible New York legislative committee explained when Section 101-bb(2) of New York's ABC Law was amended in 1971, the amendment established a system of "resale price maintenance . . . enforced by the State." N.Y. Senate Excise Comm., *Final Report* 16-17 (1971) [hereinafter cited as *Final Report*]. Indeed, the state court acknowledged that New York's statute provides for "minimum pricing" (J.S. App. 6A; cf. *id.* at 10A), and the court did not suggest that the statutory scheme was materially different from the resale pricing scheme in *Midcal* (see, e.g., J.S. App. 12A-13A (relying on differences in legislative history)).

Welfare Effects of Resale Price Maintenance, *supra*; Comanor, *Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983 (1985); Phillips & Mahoney, *Unreasonable Rules and Rules of Reason: Economic Aspects of Vertical Price-fixing*, 30 Antitrust Bull. 99 (1985); Ornstein, *Resale Price Maintenance and Cartels*, 30 Antitrust Bull. 401 (1985).

Appellees assert that New York's statute merely imposes a minimum percentage markup. They say that wholesalers set their own prices, which have "no impact on retail prices except as flow from the operation of the statutorily mandated minimum 12 percent mark-up on retail prices" (Mot. to Dis. or Aff. 9).¹⁰ But appellees are simply ignoring the fact that the New York scheme empowers wholesalers to dictate retail prices essentially without regard to what the wholesalers charge for a case of liquor.¹¹ Under the regulatory scheme upheld by the New York court, wholesalers may, as in this case, charge a "post-off" case price lower than the "legal" case price but may decide in their own discretion the extent to which that reduction in actual case price will be reflected in the bottle price on which the retail price is based.¹² While offering a post-off case

¹⁰ Appellees also attempt to distinguish this case from *Midcal* on the ground that the California price posting scheme had a horizontal price effect at the wholesale level while the New York system does not (Mot. to Dis. or Aff. 8-9). Under the California statute, all wholesalers in a trading area were bound by a price schedule filed by one wholesaler (see *Midcal*, 445 U.S. at 99-100). But in *Midcal* the Court found a Sherman Act violation based on the resale price maintenance portion of the statute alone, emphasizing that the wine producer dictated its customers' minimum resale prices (*id.* at 102-103).

¹¹ Even if appellees' characterization of the scheme were accurate, there would still be resale price maintenance, because retailers would be precluded from setting their prices independently. The scheme might then constitute "state action" (see pages 14-17, *infra*).

¹² Wholesalers that charge post-off prices can thus set their legal prices solely for their effect on retail prices. Wholesalers do not enjoy that freedom under pure minimum markup statutes, which allow wholesalers to affect retail prices only by changing their own wholesale prices.

price lower than the legal price, wholesalers can give their retailers the protected cushion of a statutorily mandated 12% markup above a bottle price significantly higher than the retailers' actual cost.¹³ Thus, New York does not have a simple percentage markup statute, as appellees contend.¹⁴ Like the producers and wholesalers in *Midcal*, New York liquor wholesalers dictate the prices that retailers must charge. See *Midcal*, 445 U.S. at 103.¹⁵

¹³ Indeed, wholesalers apparently compete for sales to retailers by advertising guaranteed extra profit margins achieved in this manner (J.A. 32-35).

¹⁴ Compare *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir.), aff'g *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981), on which appellees rely (see Mot. to Dis. or Aff. 8, 10). *Morgan* involved a Connecticut liquor pricing statute that prescribed specific minimum markups, based on "actual cost[s]" (or "bottle price[s]" that are statutorily defined to reflect actual costs (see 664 F.2d at 355); Conn. Gen. Stat. Ann. § 30-1(7) (West Supp. 1985)), at both the wholesale and retail levels. The statute did not authorize wholesalers to set resale prices; the state legislature itself performed this activity through specific statutory formulae. Compare also *Fisher v. City of Berkeley*, No. 84-1538 (Feb. 26, 1986), discussed pages 13-14, *infra*.

¹⁵ *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), cert. denied, No. 84-974 (Mar. 4, 1985), on which appellees rely (Mot. to Dis. or Aff. 7-9), is thus readily distinguishable. *Battipaglia* involved a challenge to New York's wine pricing provisions—ABC Law § 101-bbb—which parallel the liquor pricing provisions in Section 102-bb. The Second Circuit upheld the wine price posting provisions in *Battipaglia* because the New York Court of Appeals previously had invalidated—solely on the authority of *Midcal*—that portion of Section 101-bbb that prohibited retail wine sales below the prices established in the retail price schedule. *Battipaglia*, 745 F.2d at 172; *William J. Mezzetti Associates v. State Liquor Authority*, 51 N.Y.2d 761,

Nor does the State's role here mean that there is no "combination" in restraint of trade. In *Midcal*, where the private parties acted under state compulsion similar to that present here (cf. Mot. to Dis. or Aff. 7-9),¹⁶ the Court found vertical dictation plus state compulsion sufficient to create a combination. In *Fisher v. City of Berkeley*, No. 84-1538 (Feb. 26, 1986), slip op. 7, the Court recently explained that although the restraint in *Midcal* was "hybrid," in that nonmarket mechanisms merely enforce[d] private marketing decisions * * * [, when] private actors are thus granted 'a degree of private regulatory power' * * * the regulatory scheme may be attacked under § 1 [of the Sherman Act]."¹⁷ The pricing

411 N.E.2d 791, 432 N.Y.S.2d 372 (1980). Thus, when the Second Circuit decided *Battipaglia*, Section 102-bbb did not provide for resale price maintenance for wine; all that it required was that wholesalers post and adhere to their (unilaterally set) wine prices (745 F.2d at 172). The New York Court of Appeals refused to follow *Mezzetti* in this case, however, on the ground that New York "has historically regulated traffic in distilled spirits [more] strictly [than wine]" (J.S. App. 16A-17A).

¹⁶ The California statute permitted wine producers to set prices through a fair trade contract but required wholesalers to post a resale price schedule if the producer failed to do so (*Midcal*, 445 U.S. at 99). See also *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (*Midcal* involved a "statute [that facially] conflicted with the Sherman Act because it mandated resale price maintenance" (emphasis in original)).

¹⁷ See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), where a Louisiana statute authorizing liquor distributors to enforce minimum retail prices against all retailers, whether or not the retailer had "agreed to the price restrictions," was struck down because "both the selection of minimum price levels and the exclusive power to

scheme in *Midcal* "entailed a * * * degree of free participation by private economic actors," and so "the mere existence of legal compulsion did not turn [the] scheme into unilateral action by the State" (*Fisher*, slip op. 8).¹⁸ Similarly, New York's "minimum pricing" arrangement (J.S. App. 6A), which affords private economic actors substantial discretion over minimum retail prices, necessarily conflicts with the federal antitrust laws.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE STATE ACTION DOCTRINE IS INAPPLICABLE TO NEW YORK'S PRICING SCHEME

The Court of Appeals of New York properly concluded that the resale price maintenance scheme required by Section 101-bb does not constitute state action under the doctrine of *Parker v. Brown*, *supra*. In *Midcal* this Court enunciated two standards for antitrust immunity under the state action doctrine. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state pol-

enforce those levels were left to the discretion of distributors" (*Fisher*, slip op. 7-8). "While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana" (*id.* at 8).

¹⁸ The city ordinance establishing rent ceilings for all residential property at issue in *Fisher*, on the other hand, was not "the product of an illegal 'contract, combination . . . or conspiracy'" (slip op. 4 (citation omitted)) because "[n]ot just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city" (*id.* at 9).

icy'; second, the policy must be 'actively supervised' by the State itself" (445 U.S. at 105 (citation omitted)).¹⁹ The Court concluded that the first test was satisfied because the California statute clearly indicated a purpose to permit resale price maintenance (*ibid.*). The second standard was not met, however, because "[t]he State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules * * *. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program" (*id.* at 105-106 (footnote omitted)).

The New York statute in this case is indistinguishable from the California statute for purposes of state action analysis. The New York statute meets the first *Midcal* test because it plainly evidences a legislative policy to impose resale price maintenance (J.S. App. 10A). But the second test is not satisfied for, as the state court observed, "[l]iquor prices are set

¹⁹ In recent decisions, the Court has reaffirmed the applicability of the *Midcal* standard to cases involving private conduct authorized or compelled by the State. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922 (Mar. 27, 1985), slip op. 8, the Court noted, "[t]he circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in [*Midcal*]." See also *Town of Hallie v. City of Eau Claire*, No. 82-1832 (Mar. 27, 1985), slip op. 4 n.3 (although *Midcal* involved an action against a state agency, it required the same analysis as cases involving state regulation of private anticompetitive acts). *Fisher*, slip op. 9 (*Midcal* has force where "what appears to be a state- * * * administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a 'gauzy cloak of state involvement'" (citation omitted)).

by the wholesalers and the State has no power to change the prices or review their reasonableness" (*ibid.*).²⁰ As we have noted (see pages 11-12, *supra*), the wholesaler has unsupervised discretion to determine whether the retailer's cost shall be computed on the basis of a "post-off" price at which the wholesaler actually sells to the retailer, the higher "legal" price, or a price in between, as well as unfettered discretion to set its legal price initially and to adjust it thereafter within certain limits. Thus, wholesalers can elect to guarantee retailers profit margins significantly in excess of 12%.²¹ When a state chooses

²⁰ Appellees refer (Mot. to Dis. or Aff. 10 n.*) to Judge Jasen's concurrence, which emphasized the SLA's issuance of Bulletin 471 and its ability to authorize wholesale price increases in special cases as indications that the SLA "monitor[s] market conditions" (J.S. App. 24A-25A). The concurrence also relied on periodic legislative debates on liquor pricing to demonstrate the necessary "pointed reexamination" of the State's policies (J.S. App. 24A, 25A). But even if these sporadic activities constituted monitoring or "pointed reexamination" of the operation of the resale price maintenance program, that alone would not suffice to immunize a statutory scheme that delegates to private parties the authority to make pricing decisions without supervision (see *Midcal*, 445 U.S. at 105-106, noting that the State "neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts").

²¹ Thus appellees' reliance (Mot. to Dis. or Aff. 9-10) on *Hoover v. Ronwin*, No. 82-1474 (May 14, 1984), is misplaced. In *Ronwin*, this Court reaffirmed that when the anticompetitive activity being challenged is that of the State itself, acting as sovereign, it is immune from Sherman Act challenge (*Ronwin*, slip op. 14 & n.24; *Parker v. Brown*, 317 U.S. at 350-351; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52-56 (1982)). In *Ronwin*, as in *Bates v. State Bar*, 433 U.S. 350 (1977), an unsuccessful bar applicant chal-

to displace competition, it must replace it with adequate regulation. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.); *Town of Hallie v. City of Eau Claire*, No. 82-1832 (Mar. 27, 1985), slip op. 4, 9. New York's decision to allow wholesalers broad, unsupervised discretion over retail prices removes this scheme from the realm of state action.

III. THE NEW YORK COURT ERRED IN CONCLUDING THAT THE NEW YORK STATUTE IS SHIELDED BY THE TWENTY-FIRST AMENDMENT

A. Where State Liquor Regulation Falls Outside The "Core" Of Twenty-first Amendment Concerns, The State Interest May Have To Yield To The Federal Commerce Power

Section 1 of the Twenty-first Amendment repealed prohibition; Section 2 gave the states power to regulate or prohibit entirely "transportation or importation", and hence the use, of intoxicating liquor within their borders. Section 2 did not entirely repeal the Commerce Clause with respect to state liquor regula-

tion. *Ronwin* challenged the denial of his admission as anticompetitive. This Court concluded that, since the Arizona Supreme Court itself made the ultimate decision whether to grant or deny bar admission to a candidate, the conduct was that of the State itself (*Ronwin*, slip op. 20-21 n.33; see also *Bates*, 433 U.S. at 359-361). *Ronwin* reemphasized, however, that the *Midcal* test governs private conduct undertaken pursuant to state authorization or discretion (slip op. 9, 20-21 n.33). Appellees claim (Mot. to Dis. or Aff. 9-10) that *Ronwin* is controlling here because, they assert, the challenged anticompetitive activity is that of the State itself, rather than the acts of private parties. But that assertion is simply incorrect. It is not the State, but private parties (*i.e.*, the wholesalers), that determine retail prices and retail profits (see pages 2-4, *supra*).

tion; it merely created an exception to the normal operation of that clause by reserving to the states power to impose certain burdens on interstate commerce in intoxicating liquor. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711-713 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330-332 (1964). "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case" (*Midcal Aluminum*, 445 U.S. at 109 (quoting *Hostetter*, 377 U.S. at 332)); cf. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (states may not exercise powers under the Twenty-first Amendment in a way that impinges upon the Establishment Clause of the First Amendment).

When state regulation of the liquor industry conflicts with federal law grounded in the commerce power, the question is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities*, 467 U.S. at 714; accord, *Bacchus Imports, Ltd. v. Dias*, No. 82-1565 (June 29, 1984), slip op. 11-12. The Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*Midcal*, 445 U.S. at 110). Although it grants the states "substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations" (*ibid.*).

Accordingly, in *Midcal*, the Court carefully scrutinized the State's interest in maintaining resale prices of alcoholic beverages as against the "familiar and substantial" federal interest reflected in the Sherman Act. It concluded that California's interests in promoting temperance and protecting small retailers against predatory pricing by large retailers did not outweigh the substantial federal interest embodied in the antitrust laws (445 U.S. at 110-114).²²

**B. New York's Interest In Maintaining Retail Prices
Cannot Prevail Against The Federal Interest In A
Competitive Economy**

In *Midcal* the Court said, "We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy" (445 U.S. at 113-114). Here, the state court concluded that the State's interest in pro-

²² Similarly, in *Capital Cities Cable, Inc. v. Crisp*, *supra*, the Court held invalid an Oklahoma statute requiring cable broadcasters to delete liquor advertisements from out-of-state programs transmitted to Oklahoma subscribers. The Court acknowledged Oklahoma's legitimate interest in promoting temperance and accepted its judgment that restrictions on liquor advertising promoted that interest, but concluded that the State's interest was less substantial than the federal interest in the availability of cable services (467 U.S. at 714-716). Thus, the Court held that "when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the state's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause" (*id.* at 716 (footnote omitted)).

protecting small retailers outweighed the federal interest in promoting competition. The state court emphasized that in *Midcal* this Court relied on the California courts' conclusion that the State's interest in protecting small retailers was not advanced by the resale price maintenance program (*id.* at 112-113). On the other hand, it believed, the history of New York's provision "demonstrates New York's commitment to protect its small retailers and the investigative determinations upon which the statutes intended to do so are premised" (J.S. App. 15A).²³

The court below did not, however, make any finding that Section 101-bb effectively serves the purpose

²³ In recommending the 12% markup amendment to Section 101-bb in 1971, the Senate Excise Committee identified a central purpose of the legislation of "promoting temperance" (*Final Report* 18, 35; ABC Law § 101-bb(1)). The court below did not rely on that state interest in this case: the court noted (J.S. App. 16A n.2) that when Section 101-bb was first enacted in 1964 as a simple prohibition of below-cost pricing, the Moreland Commission had concluded that the assumed correlation between high liquor prices and temperance did not exist.

In 1971, when Section 101-bb was amended, the Senate Excise Committee did voice concern that per capita consumption of liquor had increased substantially since 1964, as liquor prices had decreased. The Committee did not conclude that low prices necessarily led to increased consumption, but it did conclude that "even if [state policies] do not serve to arrest the rising tide of consumption of alcohol, at least [they should] make no contribution thereto," and that "[an] all out emphasis on low liquor prices" would not "assist in influencing drinking habits" (*Final Report* 15). The Committee's report did not suggest that a resale price maintenance scheme would promote temperance, however. Rather, as the court below implicitly found, it was retailer protection alone that prompted the legislation, particularly the 12% markup amendment in 1971 (*Final Report* 30, 37).

of protecting either small retailers or consumers.²⁴ Nor would the history upon which the court relied justify such a conclusion. The court cited the report of the state Senate Excise Committee, which found that between 1964 and 1971 (when the statute simply prohibited sales "below cost") the number of retail stores declined. That same report also noted, however, that during that period many "small retailers" gained substantially in sales volume and market share to become "large" retailers (*Final Report* 3, 12-13). And although the Excise Committee concluded that action was required to preserve small retailers, the court below cited nothing in the report to indicate that the current system would be likely to accomplish that purpose. In light of the evidence cited by the California Supreme Court and this Court in *Midcal* concerning the adverse correlation between the growth of small retail stores and "fair trade" laws,²⁵ it can-

²⁴ The court concluded generally that if consumers are "to be protected from inflated prices and to enjoy the benefits to be derived from market competition, then the regulatory provisions in section 101-bb and related sections best serve that purpose" (J.S. App. 15A-16A (emphasis added; footnote omitted)). The "consumer protection" goal of eliminating the price discrimination suffered by New York residents emphasized by the appellate court is not served by the price-posting section, however, but by ABC Law § 101-b(3) (d), requiring the manufacturer to affirm that its wholesale prices are no higher than those it charges in other states (J.S. App. 6A). Neither that section nor other "related" sections of New York's ABC Law are at issue in this case. Cf. *Brown-Forman Distillers Corp. v. New York Liquor Authority*, No. 84-2030 (argued Mar. 3, 1986).

²⁵ The Court noted in *Midcal* that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in

not be assumed that a system of resale price maintenance would have such an effect.

The state court suggested that the resale price maintenance scheme was adopted to prevent "temporary price reductions * * * threatening to drive small retailers out of business and consolidating control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers" (J.S. App. 15A). If the state court was referring to predatory (below cost) pricing, its conclusion has several fundamental flaws. First, the legislative history on which it is based contains no finding of a likelihood of predation as distinct from vigorous competition. See J.S. App. 14A-15A. Second, any fear of successful retailer predation in this industry is far-fetched, see *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 13-15, especially since New York liquor retailers are limited to one outlet (ABC Law § 63). Third, and most important, the New York statutory scheme goes far beyond anything reasonably necessary to preclude predatory pricing. Section 101-bb on its face prohibits a retailer from pricing "below cost," but the statute defines "cost" in an artificial manner. It bases the retailer's "cost" on a bottle price that may have no relation to the case price that the retailer actually pays. The wholesaler need not reduce the "legal" bottle price to reflect a "post-off" case price, and the resale price must be based on the wholesale price at the time of the retail sale—a price that may differ from the price in effect at the time of the retailer's purchase from

free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws" (445 U.S. at 113; citing S. Rep. 94-466, 94th Cong., 1st Sess. 3 (1975)).

the wholesaler (see pages 2-4, *supra*).²⁶ Thus, the scheme goes far beyond the prohibition of actual below cost pricing, and precludes competitive nonpredatory pricing as well.

The State may have an interest in protecting small retailers against the lawful competition of their more efficient competitors, but, first, that interest is plainly not among the core state interests protected by the Twenty-first Amendment. Indeed, the New York statute does not (directly or indirectly) prohibit, or regulate, or tax the "transportation or importation" or use of intoxicating liquors at all (Amend. XXI, § 2); any small effect on those activities is an incidental result of a scheme to insulate from competition the merchants who deal in that commodity. In any event, any such state interest is not merely in conflict with, but a "frontal assault" upon, the interest embodied in the Sherman Act (*National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978)), and simply cannot "prevail against the undoubted federal interest in a competitive economy" (*Midcal*, 445 U.S. at 114).

²⁶ For example, retailers can stock up on items during post-off (*i.e.*, "sale") periods and then hold the items and resell them when bottle prices rise.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted.

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MAY 1986

AMICUS CURIAE

BRIEF

1

No. 84-2022

Supreme Court, U.S.

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**In The
Supreme Court of the United States**

October Term, 1985

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

v.

**THOMAS DUFFY, ANNE GLADWIN, ROBERT DOYLE, TER-
RENCE R. FLYNN and FREDERICK PANNOZZO,**

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

**BRIEF FOR VARIOUS RETAILER ASSOCIATIONS AS AMICI
CURIAE SUPPORTING APPELLEES.**

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QUESTIONS PRESENTED

1. Whether New York State's Alcoholic Beverage Control Law §101-bb is inconsistent with the Sherman Act.

2. Whether the state action doctrine immunizes the statutory scheme from Sherman Act challenge.

3. Whether Section 2 of the Twenty-first Amendment immunizes the statutory scheme from Sherman Act challenge.

EDITOR'S NOTE

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Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

**BRIEF FOR VARIOUS RETAILER ASSOCIATIONS
AS AMICI CURIAE SUPPORTING APPELLEES.**

PRELIMINARY STATEMENT

The amici curiae, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., WESTERN NEW YORK LIQUOR STORE ASSOCIATION, INC., GENESEE VALLEY LIQUOR STORE ASSOCIATION, INC., MOHAWK VALLEY LIQUOR STORE ASSOCIATION, INC., EASTERN NEW YORK LIQUOR STORE ASSOCIATION, INC., CENTRAL NEW YORK LIQUOR STORE ASSOCIATION, INC. and RETAILERS ALLIANCE, INC. represent approximately two thousand five hundred package stores that are licensed in the State of New York to sell liquor for off-premises consumption.

Every one of their members is directly affected by Section 101-bb of the Alcoholic Beverage Control Law. (ABC Law)

SUMMARY OF ARGUMENT

The purpose of Section 101-bb was stated quite accurately in *House of Spirits Inc. v. Doyle*, 72 Misc. 2d 1036, aff'd 43 A.D. 2d 880, aff'd 36 NY 2d 815. The opinion of Mr. Justice Harold J. Hughes which was adopted by both the Appellate Division and the Court of Appeals stated as follows:

"... The Court, however, will consider what it deems the main purpose of the present statute in order to determine whether the enactment is a valid exercise of the police power. The purpose for the enactment is found in the Final Report of the Senate Excise Committee which was submitted to the Legislature on April 15, 1971, a copy of which was annexed to the moving papers. Among other facts, the committee found the continued employment in the industry of "loss leader" selling and unfair pricing in the period following the 1964 enactments. The committee also found accelerating concentration of volume in the hands of a relatively few stores and that hundreds of package stores were being forced out of business.

The committee's summary of its "Findings" since the 1964 enactments noted "an inordinate and continuing emphasis on price cutting and price promotions" and the "ineffectiveness of statutes incorporated in Ch. 531 to safeguard against such emphasis." (Final Report, p. 35) It found that such emphasis is "detrimental both to the fundamental purpose of alcoholic beverage control and to the attainment of 'normal' competition contemplated in the 1964 enactments." (Final Report, p. 35) It concluded that the survival of the entire retail economy of the liquor industry was threatened.

In short, the purpose of chapter 191 was to provide for greater stabilization in the off-premises retail segment

of the industry so as to insure the ordinary sale and distribution of liquor; or, more directly stated, to prevent the large liquor stores from driving the smaller retail stores out of business.

This Court holds that this reason for the Legislation does not make it an invalid exercise of police power."

Section 101-bb is but a part of an overall statutory scheme to regulate the price of liquor in the State of New York. It cannot be looked at in a vacuum.

Of equal importance and in fact, the basis for determining the twelve percent mark up provision contained in Section 101-bb is Section 101-b of the ABC Law.

Subdivision 3(b) of Section 101-b demands that before liquor can be sold to a retailer, a wholesaler must post its price for the particular liquor with the SLA for a period of thirty days. It must sell the product at the price posted with minor exceptions for volume discounts.

The twelve percent is determined from this posting.

In addition, the price to a wholesaler must be posted and adhered to pursuant to Subd. 3(a) of Section 101-b.

If Section 101-bb is now declared unconstitutional, the police power declared valid in *House of Spirits, Inc. v. Doyle, supra*, presumably through the Twenty-First Amendment of the Constitution would be utterly destroyed.

The immediate and totally disastrous result would be to drive the small retail stores out of business because of their inability to effectively compete.

The other provision relating to price (Section 101-b of the ABC Law) would remain in place, thus destroying any profit at the retail level.

For the reasons stated in the argument which follows, Section 101-bb of the ABC Law is constitutional and should be upheld by this Court.

ARGUMENT

I. SECTION 101-bb OF THE ALCOHOLIC BEVERAGE CONTROL LAW IN NO WAY VIOLATES THE SHERMAN ANTI-TRUST ACT.

Section 1 of the Sherman Act is directed only to contracts, combinations in the form of trust or otherwise, or conspiracies in restraint of trade or commerce.

The Court of Appeals of the State of New York in *Matter of Admiral Wine & Liquor Co. v. State Liquor Authority*, 61 NY 2d 858 and the United States Circuit Court for the Second Circuit in *Battipaglia v. New York State Liquor Authority*, 74 F.2d 166 cert. denied No. 84-974 (March 4, 1985) stated that Section 101-b of the Alcoholic Beverage Control Law was not in violation of the Sherman Act because no contract, combination or conspiracy could be proven as a result of the section alone.

The definition of both cost and price as found in Section 101-bb, Subd. 2(b) of the Alcoholic Beverage Control Law (the section involved herein) stems directly from the bottle price established in the schedules filed under Section 101-b.

As the decisions in both *Admiral* and *Battipaglia* indicate, an individual wholesaler sets his own price and is not bound to follow the price of any other wholesaler.

The State of New York through Section 101-bb has determined that the posted price established under the provisions of 101-b has to be raised by at least 12%.

The price posting of any individual wholesaler is not binding on every retailer in terms of the 12% figure reached pursuant to Section 101-bb.

The retailer could buy from another wholesaler who has established a different price in its posting and the 12% figure stems from the second wholesaler's price posting.

If, for example: Smirnoff Vodka (one of the liquors in question herein) is sold by four different wholesalers, in theory, there could be four different wholesale prices posted with four different retail bottle prices and four different cost figures after the 12% is added.

The statute does not create a contract, combination or conspiracy as contemplated by the Sherman Act and so there is no violation of that law.

As this court stated in *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982):

"Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."

The State law must compel private conduct that is at all times illegal *per se* for a violation of the Sherman Act. This clearly does not exist here.

If this Court were to declare Section 101-bb unconstitutional, it would deal a death blow to many of the members of retail associations filing this *amicus* brief.

The Court would be annulling the operating margin established by the State of New York over the actual price paid by the retailers to the wholesaler.

Yet at the same time the Courts have already upheld the price established by the wholesalers to the retailers which cannot be altered for at least one month. (See *Matter of Admiral Wine & Liquor Co. v. State Liquor Authority*, 61 N.Y. 2d 858 and *Battipaglia v. New York State Liquor Authority*, 745 F 2d 166 cert. denied No. 84-974 March 4, 1985).

Throughout its brief starting at Page 17 appellant confuses Sections 101-b and 101-bb. Section 101-bb does not establish a "phantom bottle price." It merely marks up by 12% a bottle price established under Section 101-b.

It is respectfully submitted that the appellant is attempting to mislead the Court by stating that it is Section 101-bb that authorizes wholesalers to set two distinct prices and to manipulate the difference between them. It is Section 101-b that allows for the posting of a case and bottle price and this section has already withstood a Sherman Act challenge by both the New York Court of Appeals and the Second Circuit. (See *Matter of Admiral Wine and Liquor Co. vs. State Liquor Authority*, *supra*, and *Battipaglia v. New York State Liquor Authority*, *supra*).

Competitive pressures at the retail level will drive the retail price to the wholesale cost and many retailers will be forced out of business.

It cannot be overemphasized that in the highly regulated alcoholic beverage industry, the ordinary concepts of free enterprise do not exist.

The retailer cannot go to a wholesaler to establish a wholesale price different from that set in the price posted pursuant to Section 101-b of the ABC Law. This section has survived the Sherman Act challenge. (*Matter of Admiral Wine & Liquor Co. v. State Liquor Authority*, *supra*, *Battipaglia v. New York State Liquor Authority*, *supra*).

It is respectfully submitted that to annul Section 101-bb which is based entirely on Section 101-b is directly contrary to established case law.

It should be further noted that any reliance on *Matter of Mezzetti, Assoc. v. State Liquor Authority*, 51 NY 2d 761 is totally misplaced.

The *Mezzetti* decision followed a decision in this Court entitled *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

In *Mezzetti* the Court of Appeals of the State of New York annulled Section 101-bbb of the ABC Law which dealt with the minimum consumer resale price of wine.

The Court felt that Section 101-bbb was similar to the California statute declared to be in violation of the Sherman Act in the *Midcal* case.

It is respectfully submitted that there are critical differences between Sections 101-bbb and Section 101-bb so that the latter does not fall within the violation contemplated pursuant to the Sherman Act.

In pertinent part, Section 101-bbb reads as follows:

...

"2. No manufacturer or wholesaler of wine shall sell, offer for sale, solicit any order for or advertise any wine, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer resale prices for each such brand of wine shall first have been filed with the liquor authority, and such schedule is then in effect, except that written permission therefor may be granted by the authority for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the authority deems necessary.

"3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand, if licensed by the authority, or (2) a wholesaler, selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, or (3) any wholesaler, with the approval of the authority, in the event that the owner of such brand does not file or is unable to file a schedule or designate an agent for such purpose."

...

Thus, one person could set a price that had an absolute impact on the entire retail trade which in no way was determined through some state action.

With Section 101-bb, however, there is no one person setting a price that effects the retail industry.

Further the 12% figure is set by the State of New York and not private individuals.

Finally, as is more fully explained in II *infra*, the State takes a very active role in determining the price of liquor.

II. SECTION 101-bb IS IMMUNE FROM A VIOLATION OF THE SHERMAN ACT UNDER THE DOCTRINE OF STATE ACTION AS IT WAS DECIDED UNDER *PARKER v. BROWN*.

Assuming arguendo that there is a violation under the Sherman Act, Section 101-bb is immune from a violation of the Sherman Act by the doctrine of State action as established under *Parker v. Brown*, 317 U.S. 341 (1943).

The *Parker* test has two requirements. First, that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy. Second, that the policy be actively supervised" by the State itself.

It is submitted that there can be no legitimate argument against the first requirement relating to the articulated state policy.

Subdivision 1 of Section 101-bb states as follows:

"1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of liquor for the purpose of fostering and promoting temperance in its consumption and respect for and obedience to the law. In order to eliminate retail sales of liquor at less than cost which unduly disrupt the orderly sale and distribution of liquor, it is hereby declared as the policy of the state that the sale of liquor should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

It is respectively submitted that the requirement of "active supervision" is more than adequately met under

the New York statutory scheme as it relates to the pricing of liquor in this State.

It must be remembered that in the *Midcal* case the Court did not say that the State must actually set the price of the alcoholic beverage, only that it be involved in the setting of the price.

Section 101-bb cannot be read in a vacuum. It must be read in connection with Section 101-b of the ABC law.

In the State of New York liquor is "actively supervised" by the State Liquor Authority.

Section 101-b, Subd. 3b of the ABC Law demands that the price to a retailer must be posted before it can be sold.

This subdivision, in pertinent part, goes on to state as follows:

"... Where any schedule filed after the effective date hereof pursuant to paragraph (a) of this subdivision with respect to any brand of liquor reflects a reduction or increase in the bottle or case price of any item set forth therein from the bottle or case price of such item theretofore in effect for the previous month, for the period during which the bottle and case price of any item set forth therein shall remain in effect, any schedule of prices to retailers filed by a wholesaler pursuant to this paragraph with respect to such item of liquor shall reflect, in the event of a decrease, a like reduction in percentum in the bottle or case price of such item set forth therein, and in the event of an increase, not more than a like increase in percentum in the bottle or case price of such item set forth therein. Nothing herein contained however shall prohibit changes in prices to retailers by a wholesaler for any item of liquor which changes are based on increased costs of labor or

other operating costs, on the written permission of the authority, for good cause shown and for reasons not inconsistent with the purpose of this chapter, except that the case and bottle price from wholesaler to retailer may be decreased or increased without such permission to reflect any changes in or new taxes or fees applicable to liquor with the same effect as if such decrease or increase in taxes or fees were set forth in the schedule of prices filed pursuant to paragraph (a) hereof."

This part of Subdivision 3b is commonly referred to as the "pass through provision."

In essence the State of New York has effectively locked in the price of liquor from the wholesaler to the retailer since the effective date of the amendment to Section 101-b, Subd. 3b which was June 10, 1967. The pass through provisions says that the price of liquor from wholesaler to retailer as of the effective date must remain at the June 10, 1967 price unless there is a reduction or increase in the price pursuant to the schedule filed under subd. 3a of the section.

The pass through provision further demands that a decrease in price from the importer to the wholesaler under Subd. 3a must be met by a like reduction in price from the wholesaler to the retailer pursuant to Subd. 3b. However, an increase under Subd. 3a may be met by an amount not to exceed the Subd. 3a increase.

The pass through provision also states that before an increase in price can be made for increased costs of labor or other operating costs, the wholesaler must obtain the written permission of the S.L.A. The reasons given must not be inconsistent with the purposes of the ABC Law.

The pricing mechanism ends with Section 101-bb wherein the *State of New York* has deemed the price of liquor as determined under Section 101-b be increased by 12%.

Clearly the above is not some sort of private pricing agreement.

The State of New York is dictating the price.

This pricing structure is similar to the type of state supervision found in Connecticut which was found to be within the definition of the State action doctrine by the United States Appeals Court for the Second Circuit in *Serlin Wine & Spirit Merchants Inc. v. Healy*, 512 F.Supp. 936 (D. Conn.) *aff'd sub. nom. Morgan v. Division of Liquor Control*, 664 F. 2d 353 (2d Cir. 1981).

In distinguishing *Midcal*, the *Morgan* decision stated as follows:

"In contrast, the State of Connecticut establishes the markup and does not permit private parties to engage in resale price maintenance. The State of Connecticut does not control the initial offering price determined by the manufacturers or out-of-state shipper. Once that price is reported and without any compulsion or participation by the State, the statutory scheme defines the wholesale and retail prices which must be charged. Unlike the California statute in *Midcal*, the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of §1 of the Sherman Act."

The pricing of liquor in the State of New York is strictly controlled.

There is a pass through provision which has locked in the price for a particular brand since 1967 unless the SLA hears a valid reason for a change of price and grants permission to do so.

Then, there is a 12% figure determined by the State of New York in Section 101-bb as a percentage to be added on to the "pass-through" wholesale price which is also determined by the State of New York. (See also *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Fisher v. City of Berkeley*, 54 U.S.L.W. 4222 (U.S. Feb. 26, 1986).

In the *Fisher* case this Court stated as follows:

"A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here."

Section 101-bbb which was the minimum consumer resale price of wine had nothing at all in common with Section 101-bb. The former section had no other section connected to it, and said in essence that one person (the producer of the wine or its agent) could determine a resale

price that was binding on all of the retailers located in the State of New York.

It is respectfully submitted that any reliance on the abolishment of Section 101-bbb as the controlling authority as to the constitutionality of Section 101-bb is completely misplaced and should be disregarded.

It should also be noted that both the briefs of the appellant and amicus curiae in support of appellant's attempt to combine Section 101-bb of the ABC Law and Bulletin 471 issued by the State Liquor Authority (SLA) as the law relating to pricing liquor from the retailer to the public.

A bulletin issued by the SLA is not the law. It is an interpretation of the law by the administrative agency.

The appellant places great emphasis on the fact that if not for the bulletin it would not have been selling at a price of less than twelve (12%) percent of the cost of the liquor to it. It is respectfully submitted that this argument has nothing to do with the validity of Section 101-bb.

Assuming *arguendo* that the SLA has interpreted Section 101-bb incorrectly, it does not render Section 101-bb unconstitutional. (c.f. *Mancini v. McLaughlin*, 54 NY 2d 860, 444 NYS 2d 901).

III. THE PURPOSES OF SECTION 101-bb OF THE ALCOHOLIC BEVERAGE CONTROL LAW WHEN BALANCED AGAINST ANTI-TRUST CHALLENGE CLEARLY WEIGH IN FAVOR OF THE STATE STATUTE AND AS SUCH ARE PROTECTED BY THE TWENTY-FIRST AMENDMENT.

It has long been established that the Twenty-First Amendment gives the State broad powers over the control of alcoholic beverages within its borders. (*California v. LaRue*, 409 U.S. 109 (1972)).

The decision in *Midcal* teaches us that the federal and State interests must be balanced against each other to see if the State statute is protected by the Twenty-First Amendment.

It is respectfully submitted that the valid State interest herein clearly outweighs any federal consideration.

Section 101-bb was enacted to protect the public for the purposes of fostering and promoting temperance in the consumption of liquor and respect for and obedience to law; to provide for an orderly market in the off-premises retail liquor industry; and to prevent large liquor stores from driving smaller retail stores out of business. *House of Spirits, Inc. v. Doyle*, 72 Misc. 2d 1036, aff'd 43 A.D. 2d 880, aff'd 36 NY 2d 815.

Clearly if Section 101-bb were to be declared unconstitutional the valid purposes would all be ruined.

The immediate effect would be the overstimulation of the consumption of liquor through a drop in prices caused by extreme retail competitive practices.

This would be followed by the elimination of most of the smaller "mom and pop" stores that cannot effectively compete with the larger retail stores.

With no real competition left the consumers would be subjected to potential excessive pricing and other abuses. The evils intended to be corrected by preserving the neighborhood stores would be lost. Section 101-bb preserves competition and lends fairness and orderliness to the market place.

It is respectfully submitted that unlike the *Midcal* and *Mezzetti* cases there was a legitimate overriding state interest that clearly outweighs any federal concern and as such Section 101-bb is protected by the Twenty First Amendment to the Constitution.

The briefs of the appellant and the amicus curiae in support of appellant go on about how competition and free enterprise must be allowed and that the protection of the New York liquor retailer is not important.

It should be noted that pursuant to the Twenty First Amendment the State of New York has extensive regulation of alcoholic beverages as it relates to retailers. Because it can control alcoholic beverages within its borders the concept of "free enterprise" has no valid relationship herein.

A retailer is limited as to the number of stores he can

own;¹ items he can sell;² as to when he can sell them;³ as to the location of the premises the item can be sold in;⁴ at what price he can sell at;⁵ from whom he can buy;⁶ and at what price he can buy liquor.⁷

A retailer cannot go to the marketplace and purchase liquor at a better price because this particular retailer has the ability to make a volume purchase.

The price posting provisions contained in Section 101-b of the ABC Law and Rule 16 of the Rules of the State Liquor Authority [9NYCRR65] mandate that all retailers, whether they buy two cases or two thousand cases, pay the same price per case.

Thus, any retailer has paid the same price for the same brand of liquor as any of his competitors. There can be no true competition among retailers so long as there is no economic incentive to charge a better price to the public because he cannot buy at a better price. The price posting provisions to the retailer have been upheld,⁸ and it would be a deathblow to many retail liquor stores if they were forced to bring down the price of liquor to the price they pay for it.

1. Section 65, Subd. 5 of the ABC Law allows for only one store.

2. Section 65, Subd. 3 of the ABC Law allows for only liquor, wine, lottery tickets and cork screws.

3. Section 105, Subd. 14 of the ABC Law mandates stores close on Sundays and on other days between midnight and 8 A.M.

4. Section 105, Subd. 2 of the ABC Law.

5. Section 101-bb of the ABC Law.

6. Section 101-b of the ABC Law.

7. Section 101-b of the ABC Law.

8. *Admiral Wine & Liquor Co. v. State Liquor Authority*, 61 NY 2d 858, *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 cert. denied No. 84-974 (Mar. 4, 1985).

All that the elimination of "twelve percent" would accomplish is vigorous competitive pressure at the retail level bringing the price down to the cost of the item which is established in the price posting provisions contained in Section 101-b of the ABC Law.

This further results in the demise of many retail stores.

It should be further noted that Section 101-b allows a wholesaler to go to the State Liquor Authority for a price increase for the 1967 locked price if good cause is shown.

Upon information and belief in the nineteen years since the legislation has been passed, wholesalers have received permission to increase their prices approximately sixteen (16%) percent.

The retailer has been limited to their twelve (12%) percent markup since the implementation of Section 101-bb in 1971.

Thus, in the liquor industry the wholesalers have a greater markup than retailers.

This is hardly a free enterprise industry and the elimination of the twelve (12%) percent markup will surely add to the heavy burdens already placed on a retailer to survive in today's market.

CONCLUSION

SECTION 101-bb OF THE ALCOHOLIC BEVERAGE CONTROL LAW IS NOT IN VIOLATION OF THE SHERMAN ACT AND, ASSUMING ARGUENDO THAT IT IS, IT IS CLEARLY PROTECTED BY THE STATE ACTION DOCTRINE AND THE TWENTY-FIRST AMENDMENT.

Respectfully submitted,

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Retailer Associations

MARTIN P. MEHLER
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AMICUS CURIAE

BRIEF

JUN 26 1985

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

324 LIQUOR CORP.,
d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

v.

THOMAS DUFFY, et al.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

**BRIEF FOR WINE, LIQUOR & DISTILLERY
WORKERS UNION LOCAL 1, AFL-CIO,
LIQUOR SALESMEN'S UNION LOCAL 2,
AFL-CIO, & LOCAL 816, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, IND. (HEREIN THE
"UNIONS") AS AMICI CURIAE SUPPORTING
THE APPELLEES.**

[Short Appendix Attached]

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QUESTIONS PRESENTED ON THIS APPEAL

1. Does §101-bb(2) of the New York State Alcoholic Beverage Control Law ("ABC Law") present a *per se* violation of and is it preempted by the Sherman Act in that it prohibits the resale of liquor to the consumer below the retailer's "cost" as defined by the statute?

2. Assuming the validity of §101-bb, as such, is §101-bb affected by the adoption of Rule 16.4(e) by the SLA (N.Y. Adm. Code, Tit. 9, §65.4(e), JS App. 70A) or by the promulgation of SLA Bulletin 471, dated June 29, 1973 (JS App. 71A)?

3. Assuming, *arguendo*, that the statute presents a Sherman Act violation, does it qualify under the state action exemption enunciated by this Court in *Parker v. Brown*, in distinguishing the New York statute from the California statute in *Midcal*?

4. Are §101-bb, Rule 16.4(e) and Bulletin 471 immune from the Sherman Act challenge by force of Section 2 of the Twenty-First Amendment notwithstanding the Commerce Clause?

5. Does the State's interest in regulating the intrastate distribution and sale of liquor in New York outweigh the Federal interest in the Sherman Act?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

324 LIQUOR CORP.,
d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,

v.

THOMAS DUFFY, et al.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

**BRIEF FOR WINE, LIQJOR & DISTILLERY
WORKERS UNION LOCAL 1, AFL-CIO,
LIQUOR SALESMEN'S UNION LOCAL 2,
AFL-CIO, & LOCAL 816, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, IND. (HEREIN THE
"UNIONS") AS AMICI CURIAE SUPPORTING
THE APPELLEES.**

[Short Appendix Attached]

INTEREST OF THE UNIONS

The Unions are directly concerned with the outcome of this litigation. The invalidation of §101-bb(2) of the New York State Alcoholic Beverage Control Law (ABC Law) will weaken the entire regulatory design of the New York statute. The absence of such control by the SLA will lead to chaotic market conditions,

foster unethical selling practices at the retail level, - all resulting in mass unemployment, not only among the members of the Union-Amici, but generally among the thousands of unaffiliated employees in the industry, and other employees engaged in related industries throughout the State. These were the conditions prior to the adoption of the challenged statute by the N.Y. Legislature in 1971. (Final Report, N.Y. Senate, Excise Comm. 4/15/71; *House of Spirits v. Doyle*, 72 Misc.2d 1036, 1040 *aff'd* 43 A.D.2d 880, *aff'd* 36 N.Y.2d 815)

Identity of Union-Amici Filing Brief

Local 1 is the collective bargaining representative for approximately 2,500 warehousemen, clerks, displaymen, retail store clerks and a variety of employees working in the State of New York who are directly dependent for their employment upon wholesale distributors, manufacturers, suppliers and upon a large complement of retail package stores.

Local 2 represents approximately 1,100 wholesale alcoholic beverage salespersons who sell alcoholic beverages to retail outlets, namely, package stores for off-premises consumption, hotels, bars, restaurants and clubs. The major part of a salesperson's income is derived from sales to package stores throughout the five Counties of New York City, the Counties of Orange, Westchester, Putnam, Rockland and neighboring Counties to the North. In addition, there are many other salespersons employed throughout the State of New York by manufacturers, importers and wholesalers.

Local 816 is the collective bargaining representative for approximately 800 drivers, chauffeurs, helpers and dispatchers working in the City of New York and the Counties of Nassau and Suffolk. There are other local unions representing similar classifications, as well as unaffiliated employees, throughout the State of New York. Local 816 employees are involved in the distribution and pickup of alcoholic beverages from and to rectifying plants, retail outlets, from and to distributors, suppliers and retailers and *vice versa*. The bulk of their activities concern deliveries to retail package stores.

The employment of members represented by Locals 1, 2 and 816 is dependent upon the vitality of not only the distributors and other employers, but also upon the continued existence of the many thousands of "Mom and Pop" stores which constitute the bulk of the independent unaffiliated neighborhood retail package stores.

STATEMENT OF THE CASE

This brief adopts the Statement presented in the Amicus Brief of the United States with the following modifications and additions:

A. In Section "1", last paragraph, page "4", top, the following language is substituted: "Bulletin 471 seeks to eliminate the possibility of 'two bottle' prices resulting from 'post-off' periods, and, pursuant to §101-bb(2), the Bulletin couples the 'bottle cost' with the wholesaler's schedule filed for the current month in which the retail sale is made. SLA recognizes that 'case prices' may be posted off for any given month without an accompanying reduction in the 'bottle price'. This may or may not result in a 'statutory' cost that is higher than the retailer's actual bottle cost plus 12% mark-up. It should be noted that the 'bottle' price set by the wholesaler, before discounts, during a period when there are no post-offs, may similarly not be in accord with the case price when the case price is divided by the number of bottles in the case. This formula is set by the Rule making power of the SLA. (JS App. "M"; Gov't brief, p.3,fn.3; Maj.Op. 64 N.Y.2d atp.514.) Rule 16.4(e) requires wholesalers, in setting the 'bottle' price to retailers, to add \$1.92 to the case price and dividing that result by the number of bottles. No variations are permitted without the approval of the SLA.

B. The following addition is made to Section "3", at p.5, line 3, to the summary of Judge Jasen's concurring opinion: "Additionally, Judge Jasen found that under the 'state action doctrine', New York, through the SLA, actively supervises the pricing scheme established by the challenged statute and satisfies the 'two-part' standard enunciated in *Parker v. Brown*, and its progeny. (JS App. "A", 24A)"

C. "The facts in this case are undisputed and are fully discussed in other briefs submitted on this appeal."

ECONOMIC ASPECTS TO BE CONSIDERED

In the past two decades, there has been a remarkable concentration of sales in "giant" operations at the package store level. (See *House of Spirits v. Doyle, supra*, 72 Misc.2d at 1039)

The giant package stores have been organized into "associations" that conduct widespread group advertising for its members, indicating to the public that the affiliated stores are providing exceptional discounts. (Appendix to this Brief, 1A through 1E) The rapid increase in the number of "association stores" has resulted in the marked reduction of sales in the neighborhood stores, and the discontinuance or bankruptcy of many of them.

In 1964, Governor Rockefeller appointed a Moreland Commission to investigate conditions in the liquor industry. Legislation followed which repealed the "price maintenance" structure for liquor. The repealed statute was, in fact, a "fair trade" mechanism whereby the resale prices to the consumer were set by the manufacturer and wholesaler without the intervention of the State, which had had the protection of the Miller-Tydings Act. (50 Stat. 693) A similar "fair trade" requirement (ABC Law, §101-bbb), regulating the prices for retail sales of wine was left intact in 1964 until the New York Court of Appeals correctly held that Section to be violative of the Sherman Act. (*Wm. J. Mezzetti Associates v. State Liquor Authority*, II, 51 N.Y.2d 761, 432 N.Y.S. 2d 372 (1980), *rev'g* its prior decision in 49 N.Y.2d 753, 426 N.Y.S. 2d 479, based upon this Court's decision in *Midcal*.)¹

§101-bb traveled a different route. After the elimination of the "fair trade" provision, the 1964 amendment of §101-bb did not

¹ The Government Brief (fn. 15, pp. 12-13) refers to the misinterpretation by the Majority Opinion of the ruling in the *Mezzetti* case. (64 N.Y.2d 504, 520-1). In *Mezzetti II* (51 N.Y.2d 761 [1980]), the Court of Appeals summarily invalidated New York's wine retail price maintenance statute §101-bbb. That section was properly invalidated because, as in *Midcal*, it was a "fair trade" structure. See: Concurring Op. of Suozzi, P.J. in *Mezzetti I*, 66 A.D.2d 800 (2nd Dept. 1978)

impose a minimum markup as such. It prohibited retail sales below cost, and mandated the addition of a "breakage" or "split case charge" to the bottle price by adding to the case price 96¢ and dividing the result by the number of units in the case to arrive at the bottle price. (Appl't's Brief, p.10) A parallel provision is contained in SLA Rule 16.4(e) (Tit. 9, NYCCR, §65.4(e)) which now increases the addition to \$1.92.

Under the 1964 amendment to §101-bb, "cost" was interpreted to be the wholesale price posted by any wholesaler in the State rather than the price charged by the particular wholesaler selling the item to the retailer. Thus, it was possible for a retailer to sell below its "cost" without violating the law. As a result, the market became chaotic by "cut-throat" competition from the giant retail operators who attracted purchasers by offering "loss leaders" through extensive advertising. Many hundreds of neighborhood package stores were forced out of business. (*House of Spirits v. Doyle, supra*, 72 Misc.2d at 1039; *J.A.J. Liq.Store v. N.Y. Liq. Authority*, 64 N.Y.2d 504, 519-20, 490 N.Y.S.2d 143, 151-2 (Dec., this case in N.Y.Ct. of App.))

Conditions became so serious as to generate hearings before the New York Legislature. The New York Senate's Excise Committee issued detailed findings recommending the amendment of §101-bb to its present form by prohibiting the sale of spirits by the retail package store to the consumer below "cost", as defined in the new law. (Chap. 191 Laws of 1971, McKINNEY, N.Y. *Alcoholic Beverage Control Law* §101-bb; see *House of Spirits v. Doyle, supra*, discussing the Final Report of the Excise Committee) in *House of Spirits*, Special Term of the N.Y. Supreme Court summarized the history of §101-bb, detailing the State's vital interest in preserving the small neighborhood package stores and the importance of maintaining an orderly distribution of alcoholic beverages. That Court state (72 Misc.2d at 1039):

"Among other facts, the [legislative] committee found the continued employment in the industry of 'loss leader' selling and unfair pricing in the period following the 1964 enactments. The committee also found

accelerating concentration of volume in the hands of a relatively few stores and hundreds of package stores were being forced out of business.

"The committee's summary of its 'Findings' since the 1964 enactments noted 'an inordinate and continuing emphasis on price cutting and price promotions' and 'ineffectiveness of statutes incorporated in Ch.531 to safeguard against such emphasis.' (Report, p.35) It found that such emphasis is 'detrimental both to the fundamental purpose of alcoholic beverage control and to attainment of "normal" competition contemplated in the 1964 enactments.' (Report, p.35) It concluded that the survival of the entire retail economy of the liquor industry was threatened."

"In short, the purpose of chapter 191 was to provide for greater stabilization in the off-premises retail segment of the industry so as to insure the ordinary sale and distribution of liquor; or, more directly stated, to prevent the large liquor stores from driving the smaller retail stores out of business. *****

"Since it seems patent that the mass of small retailers are unable to compete with the large volume outlets that have emerged, most appear doomed barring adoption of some formula that will permit the co-existence of both types of outlets. This leaves New York's consumers facing the future prospect of being relatively poorly served only by mass merchandisers. (Report, pp.29-30)"

In recent years, groups have challenged various aspects of the regulatory provisions of the ABC Law, e.g., the posting of prices by manufacturers, importers and wholesalers and an earlier similar challenge to §101-bb as is made in the instant case.

² The decline in the number of retail package stores has been considerable. Passage of §101-bb has reduced the rate of decline. (JS App. "P", 99A)

Battapaglia v. State Liquor Authority, 745 F2d. 166 (2d Cir. 1984), *cert den.* ____ U.S. ____, 105 S. Ct. 1393 (1985) (unsuccessful challenge to the filing provisions of §101-b); *Admiral Wine & Liquor, v. State Liquor Authority*, 61 N.Y.2d 858, 473 N.Y.S.2d 989 (1984) *modifying* 89 A.D.2d 522, 452 N.Y.S.2d 213 (1st Dept. 1982) (same challenge as in *Battapaglia, supra*); *House of Spirits v. Doyle, supra* (wherein the Appellant's counsel appeared and unsuccessfully challenged the same §101-bb).

The proliferation of the association or group stores can be best exemplified by the constant and widespread advertisements, (This Brief, App. Exhibits 1A-1E) There are a number of such groups three are represented by the attached advertisements 1984 and in _____, 1986, to wit, "PRICE-CUTTERS", "BUY-RITE" and "WINE FACTORY OUTLET". The advertisements and statements therein leave the definite impression with consumers that these stores offer the "lowest prices".

Because the "association stores" are essentially blocks of the largest retail stores, and indulge in widespread collective advertising, the members have unusually strong bargaining power in their dealings with manufacturers, importers and wholesalers. If §101-bb were to be annulled, the association members would be in an extraordinary position to exact discriminatory rebates and discounts from their suppliers. In such event, the main objective of the statute to prevent "Unlawful Discrimination And Price Scheduling" found in such sections of the ABC Law as §§101-b(2) (a) and 101-b(2) (b) would be frustrated (Maj.Op. at 514-15) and would offend both the Sherman and Robinson Patman Acts. (15 U.S.C. §1 *et seq*; 15 U.S.C. §13)

Should the provisions of §101-bb be invalidated by this Court, there will be a reverter to the chaotic conditions found to exist by the Senate's Excise Committee in 1971. A return to those unethical selling practices at all levels will eventually destroy the regulatory structure of the statute and the industry. (Maj.Op. at 514-15) The semblance of economic parity now enjoyed by the small neighborhood store owner will vanish. The first casualties will be the "Mom and Pop" stores, the backbone of the retail trade.

"If they (Appellant) are successful, liquor prices will be deregulated and other statutory provisions designed to protect small retailers from unfair competition such as those specifying maximum discounts, prohibiting wholesalers from granting discriminatory discounts, prohibiting wholesalers from granting free merchandise or other inducements [§101-b(2) (b)]; *Brown-Forman v. State Liquor Authority*, 64 N.Y. 2d 479 [decided herewith] and provisions limiting the credit period afforded to retailers by wholesalers (§101-a(2)) will lose much of their force." (Maj. Op. 64 N.Y.2d at 515)

§101-bb is a deterrent to uncontrolled price-cutting and protects the neighborhood retail store from further harm. Without the competition from the neighborhood store, the giants could exercise monopoly power over the wholesalers by the domination of the retail segment of the industry, and be free to set the consumer price at will. Thus, the State of New York and its citizens have a very substantial interest in regulating the distribution and setting the minimum retail price at "cost" to the consumer, - solely an intrastate activity.

SUMMARY OF RELEVANT PARTS OF ABC LAW; RULE 16.4(e) AND BULLETIN 471

The N.Y. ABC Law "regulates extensively the sale and distribution of alcoholic beverages within its borders". (*Brown-Forman Distillers v. N.Y. Liquor Authority*, ____ U.S. ____ No. 84-2080, decided 6/3/86, slip op. p. 1)³ is actively administered by the State Liquor Authority and supervised by the State Government itself

³ On June 3, 1986, this Court declared invalid, as interfering with interstate commerce, §101-b(3)(d) of the ABC Law which requires a distiller to file an affirmation that "the bottle" and "case" prices of liquor to wholesalers, set forth in the schedule, are no higher than the lowest prices at which such item of liquor will be sold anywhere in the United States. While that ruling is not controlling in the instant case, the Court did recognize that "New York has a valid constitutional interest in regulating sales of liquor within the territory of New York" (*Id.*, slip op., 11)

(Jasen, J. Con. Op. in Court of Appeals, 64 N.Y.2d 526-9, 490 N.Y.S.2d 156-8)* The statute articulates, as its objective, the fostering of temperance the regulation of the orderly sale and distribution of liquor, the elimination of retail sales at less than cost, the avoidance and the elimination of discriminatory rebates, discounts, etc. (§§101-b(1), 101-bb). All matters of intra-state regulation.

The ABC Law presents a "three-tiered" regulatory price structure at the manufacturers', wholesalers' and retailers' level, similar to the structure of the Connecticut statute upheld in *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936 (DC Conn. 1981), *aff'd sub nom., Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981).

On this appeal, §101-bb(2) and a SLA Bulletin 471 are under attack as violative of the Sherman Antitrust Act §1. This provision seeks to preserve competition while promoting equal opportunity for all retail package stores within the State by preventing unfair selling practices (Maj.Op., 64 N.Y.2d at 620-1) and prohibiting the stores from selling or advertising the sale of liquor for off-premises consumption at a price which is less than "cost" as defined by the statute. (*Id.* at 623; JS App. 62A-64A)

§101-bb(1) articulates the State policy as being necessary (i) to regulate and control the manufacture, sale and distribution of liquor within the State and to foster temperance and respect for the law; and (ii) to eliminate retail sales of liquor at less than cost which unduly disrupts the orderly sale and distribution of liquor. This policy is "declared as a matter of legislative determination".

Subdiv. 2(a) defines "liquor" as only those brands or trade name labels registered with SLA. *Subdiv. 2(b)* defines "cost" as the price of such item to the retailer plus 12 % of such price, which is declared as a matter of legislative determination to represent the

* References to the opinions in the N.Y. Ct. of Appeals will be "Maj.Op.", "Con.Op." and "Dis.Op." for the majority, concurring and dissenting opinions respectively.

retailer's average minimum overhead. "Price" means the bottle price before any discounts as appears in the applicable schedule filed with the SLA pursuant to §101-b by a manufacturer or wholesaler from whom the retailer purchased the liquor, and according to the schedule in effect at the time of the retail sale; if there is no applicable filed schedule, then the bottle price is computed on the case price appearing in the most recently received invoice.

Subdiv. 3 permits the sale or advertising by a retailer at a price less than "cost" provided prior permission is granted by the SLA for good cause shown.

Subdiv. 4 authorizes SLA to promulgate rules which are necessary (a) to carry out the purposes of the section and to prevent circumvention (b) to permit the sale of merchandise which is damaged or deteriorated in quality or to close out a brand for less than cost under certain conditions; (c) to permit the sale below cost to avoid practical difficulties and unnecessary hardships.

Subdiv. 5 provides for disciplinary action by the SLA for any violation.

"Statutory Price" is intimately related to the filing provisions of §101-b which also declares the legislative policy.

§101-b(2) makes it unlawful for any person to sell liquor or wines to wholesalers or retailers or to discriminate by price and discounts between one wholesaler and another wholesaler or between one retailer or another retailer or to grant any discount, rebate, free goods or other inducements except to allow a discount not in excess of 2% for "quantity" and a discount not in excess of 1% for early payment.

§101-b(3)(a) prohibits the sale or purchase of wine and liquors by a wholesaler unless a schedule of the case and bottle prices, and the discounts, if any, is filed by the manufacturer or supplier with the SLA.

§101-b(3)(b) prohibits the sale to or purchase of wine or liquor by the retailer unless an appropriate schedule is filed containing various information as to case and bottle prices to retailers showing the discounts, if any, and may not be sold to retailers except at the price and discounts then in effect unless written prior permission is granted by the SLA for good cause shown. Prices to retailers may only be increased with the permission of the SLA to reflect increased cost of labor and other operating costs.

§101-b(3)(d) requires any distiller to file an affirmation that "the bottle and case price of liquor to wholesalers is not higher than the lowest price charged elsewhere in the United States".

§101-b(4) requires wholesalers to file schedules of prices and other information to be filed on or before the fifth day of each month. The schedule becomes effective on the first day of the calendar month following its filing. Within ten days of the filing such schedule, the SLA must prepare a composite of all schedules for inspection by the licensees. Within three days thereafter, a wholesaler may amend its schedule for sales to retailers to meet lower competing prices and discounts for liquor or wine of the same brand or tradename and of like age or quality, filed by competitors, provided such amended prices are not lower and the discounts not greater than those to be met.

The overall statute and specifically Bulletin 471, permit wholesalers to "post-off" or reduce either the case price or the bottle price in any particular month, provided a schedule is filed timely with the SLA (Bulletin 471, JS App. "M", 71A)

Rule 16.4(e) [Tit. 9, NYCCR §65.4(e)] requires the suppliers of liquor to retailers to post separately the bottle price and the case price. In computing the bottle price, the wholesaler must add to the case price, containing 48 or fewer bottles a "breakage" charge of \$1.92. (Appl't's Brief, 7). The bottle price is then computed by dividing that figure by the number of containers in the

* This provision was declared unconstitutional as violative of the Commerce Clause. See fn. 3, *supra*, p. 8

case. There can be no variations from the Rule without permission of the SLA.

The provision of SLA Rule 16.4(e) does not convert §101-bb into a Sherman Act violation. Under SLA's rule-making powers, this Rule was adopted from a pre-existing statute permitting the addition of a "breakage charge" to be added to the "bottle cost" to be charged retailers. As in the case of §101-bb, this added charge is set by the statute as "State Action" in which the wholesalers play no part, nor is there any agreement or unlawful conspiracy by private parties. Both New York Appellate Courts did not find it necessary to pass upon the validity of the Rule. A reading of the Rule leads to the conclusion that no antitrust problem is raised by it because the specific addition is confined to state action.

SUMMARY OF ARGUMENT

§101-bb does not present a violation of the Sherman Act because it is limited to intrastate activities and does not authorize or mandate private parties to enter into concerted action such as making "fair trade" agreements. This case is clearly distinguishable from *Midcal*. The main thrust of Appellant's argument is directed at Bulletin 471, which was validated by the Majority Opinion in the N.Y. Court of Appeals. Should the Court find Bulletin 471 offensive, it would not be justification for invalidating the entire statute. In any event, should the Court find the statute to be offensive, then, on the record in this case, "state action" immunity is applicable. Should the Court conclude that the statute is not saved by *Parker v. Brown*, then, in balancing the Federal antitrust interests against the State interests in the background of the purposes and "functions" of the challenged statute, it is submitted that, under the powers granted by the Twenty-First Amendment of the U.S. Constitution, the State interests should prevail and outweigh the Federal antitrust interests based on the objectives and functions of the statute to prevent discrimination, permit orderly distribution and protect the "little" storekeeper, while at the same time guarding consumer interests.

ARGUMENT

I

THE CHALLENGE TO THE STATUTE AND ANSWER THERETO: IF, ARGUENDO, SLA BULLETIN 471 IS DEEMED OFFENSIVE, ONLY THAT BULLETIN SHOULD BE INVALIDATED, NOT THE STATUTE.

The main thrust of the challenge is directed at SLA Bulletin 471 which provides a mechanism for establishing the "case" and "bottle" prices under §101-bb(2) when a wholesaler files a monthly schedule containing "post-offs" or reduced prices. The Bulletin is a substitute for a prior version which had caused confusion, "if not illegal", in determining the "bottle price" as a result of the "post-off." The Bulletin was an attempt to eliminate the "two bottle" Problem. (JS App. "M", 71A)

In challenging the Bulletin, Appellant urges that the wholesalers, in fact, have it in their power to fix "the cost" price to the retailer and give increased discounts in violation of the limitations set by §101-b(2). Appellant also argues that because the retailer is required to compute his cost on the basis of the wholesaler's scheduled price in the month in which the retail sale is made, the appellant in this case committed a technical violation of the statute as written when, in fact, the price which he charged which was the subject of the discipline imposed, was greater than his actual cost plus 12% (Applt.'s Brief, 11-12)

The Majority Opinion in the Court of Appeals disagreeing with the Appellate division and answering the Appellant's challenge, stated it as follows: (64 N.Y. at 513-14)

"This [§101-b] is a constitutionally permissible price posting statute which does not authorize anyone to determine prices which bind others in violation of the Sherman Antitrust Act. See *Matter of Admiral Wine & Liq. Co. v. State Liq. Authority*, 61 NY 2d 858; *Battapaglia v. New York State Liq. Authority*, 745 F.2d

166 [2d Cir., Sept. 21, 1984], *cert. den.* ____ U.S. ____, 105 S. Ct. 1393."

"Exercising its statutory authority to reduce prices to meet competition (see, §101-b[4]), respondent (SLA) also has issued Bulletin 471 which permits wholesalers to temporarily 'post-off' on, or reduce, the case price. They may also 'post-off' on the bottle price at the previous list price or at a price which is proportionately equivalent to the reduction in the case price. At the end of the 'post-off' period, the wholesaler may return to but not exceed 'legal' maximum price reflected in the schedule filed with respondent."

The Court continued at p.523 (64 N.Y.2d):

"Preliminarily, the Appellate Division erred in using the purported anti-competitive effect of Bulletin 471 as a basis for invalidating §101-bb. Constitutional problems created by a regulation should be resolved by invalidation of the regulation alone, not invalidation of both the statute and regulation (*cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 58 NY 2d 143, 154, 459 N.Y.S.2d 743, 446 N.E.2d, 428) In addition, the Bulletin is a proper exercise of the Liquor Authority's rule making power under Alcoholic Beverage Control Law §101-b(3) (b) and Alcoholic Beverage Control Law §101-b(4).

"Bulletin 471 allows individual wholesalers to decide whether to 'post-off' reductions on case prices accompanied by corresponding reductions in bottle prices. In some situations the wholesaler may choose to grant a similar price reduction on the bottle price, or no reduction at all. This practice is consistent with Alcoholic Beverage Control Law §101-b(3) which does not mandate any price ratio between scheduled case and bottle prices.

"The Appellate Division concluded that the Bulletin is invalid, in part, because it permits a 'post-off' on a

case which is not followed by an equivalent 'post-off' on a bottle price with the result that a retailer may charge a markup in excess of 12%. Bulletin 471 does not authorize such a practice. In reselling a bottle of liquor which was purchased by the retailer as part of a full case, the minimum markup price is derived from the statute by referring to the scheduled bottle price and adding 12%, rather than dividing the case price by the number of bottles in the case and then adding 12% to each bottle to be individually resold. As a result, the 'post off' price of a bottle of liquor is the governing figure, not the case price. A retailer pays the scheduled 'post-off' price regardless of the number of cases or bottles purchased.⁹

Assuming, *arguendo*, that this Court should find that the mechanism formulated in Bulletin 471, in combination with §101-b and 101-bb, might present a serious question under the Sherman Act, then the Court should "lay the knife" to the Bulletin and not to the statute. (Maj.Op. at 523, *supra*; Cf. *In Re Horner's Will*, 237 N.Y.489, 495, 143 N.E.655 (1924) Cardozo, J., speaking for the unanimous Court in a case involving an invalid provision in an otherwise valid testamentary trust, stated:

"We said in *People ex rel. Alphonse Fortland Cement Co. v. Knapp*, 230 N.Y.48, 60, 129 N.E.202, 207, considering the question whether a statute was to be enforced with the invalid part cut out or was to be rejected altogether, that 'the answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots' The same thing may be said of the surgery of wills."

If Bulletin 471 is found offensive to this Court, the otherwise valid portions of the statute and Rule 16.4(e) should be preserved.

⁹ The Government's Amicus Brief acknowledges that the interpretation of the statute by the highest State Court is binding on this Court. (Govt Brief, fn. 3, pp. 3-4)

II

THIS CASE IS CLEARLY DISTINGUISHABLE FROM MIDCAL: APPELLANT'S RELIANCE THEREON IS MISPLACED.

The Appellant and the Government rely principally on this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. 97. (Applt. Brief, 14, 18, 21, 30-31, 37-43; Gov't Brief, 6-14, 19-21) This reliance is misplaced because of the striking distinctions that exist between the statutes involved and the facts found by the respective courts.

In *Midcal*, the statute required wine producers, wholesalers and rectifiers to set the prices to wholesalers through "fair trade agreements" without the intervention of the State. In those cases where no such agreement was filed by the producer, wholesaler or rectifier, an individual wholesaler had to file a schedule. A single agreement or schedule so filed was binding upon all wholesalers, non-parties to the agreement, to sell wine at the wholesale price so established.

The California Court had no difficulty in finding this to be a private "fair trade" agreement and a *per se* violation of the Sherman Act. That court relied upon a prior decision in the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 146 Cal. Rptr 585, 579 P.2d 476 (1978) striking down a similar scheme relating to the sale of liquors. *Midcal* did not involve a "minimum mark-up" or a "fixed cost" dictated by a State statute. On the contrary, the California statute did authorize and compel private parties to enter illegal "fair trade" agreements, in violation of the Sherman Act.

In discussing the legislative history of "fair trade" agreements, this Court stated: (445 U.S. at 103, 100 S.Ct. at 941-2)

"For many years the Miller-Tydings Act of 1937 permitted the States to authorize resale maintenance. (50 Stat.693) The goal of that statute was to allow States

to protect small retail establishments that Congress thought might otherwise be driven from the market place by large volume discounters. But in 1975 the congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation. Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity."

Thus, this Court had no difficulty in reaching the same conclusion as the California court below, citing *Schegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 90 L.Ed. 1035 (1951). "The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." (*Id.* at 341 U.S. at 103, 100 S.Ct. at 942) It concluded that this scheme was just as effective as if the wholesalers had conspired to fix prices by private agreement. (*Id.*)

Having found a *per se* violation, the Court then turned to determine whether the State action immunity doctrine, as laid down in *Parker v. Brown*, was applicable. The Court restated the rule that in order to be saved by *Parker*, it had to appear (1) that the State policy was clearly articulated, and (2) that the State actively supervises such statute. This Court found an articulated policy in the statute, but concluded that California only showed a passive interest in supervising the statute which was limited to the enforcement of violations of fair trade agreements.

"Taking the case as it found it", this court was guided by the findings of the California courts in the earlier *Rice* case and in *Midcal*. The State presented no compelling facts to warrant *Parker* immunity. Cataloguing California's attitude of indifference in the administration and supervision of the statute, this Court found that the State agency in *Rice* had not sought certiorari in this Court; that in a parallel case (*Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3996, 151 Cal.Rptr 492 (1979) the State failed to appeal the decision to the California Supreme Court. The *Capiscean* court, following the

analysis in *Rice*, invalidated California's retail resale price maintenance. In *Midcal*, the Retail Liquor Dealers Association, an Intervenor in the state court action, alone applied for permission to appeal to the California Supreme Court, which was denied. Thereafter, the Association, alone, applied to this court for certiorari. The State appeared as an intervenor in this Court only after certiorari was granted. (445 U.S. at 102-3, 111, 100 S.Ct. at 941, fns. 4,5,12; see also *Battipaglia v. State Liquor Authority*, *supra*, 745 F.2d at 171)

In denying *Parker* immunity in *Midcal*, this Court stated (445 U.S. at 105, 100 S.Ct. at 943):

"The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules, nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of State involvement over what is essentially a private price fixing arrangement. As *Parker* teaches, 'a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful' . . ."

In footnote 9, the Court observed: (445 U.S. at 106)

"The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E.g.*, Va Code §§4-15, 4-28 (1979) Such comprehensive regulation would be immune under *Parker v. Brown* since the State would 'displace unfettered business freedom' with its own power." (citations omitted)

The ruling in *Midcal* is consistent with this Court's earlier decision in *Schwegmann v. Calvert Distillers Corp.*, *supra*, where

the state statute authorized liquor distributors to enforce "fair trade agreements" fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributors products without being a party to such agreement. The price was set by the private parties without the intervention of the state, nor was the price set by the statute.

The statute and the facts in the instant case are radically different. The "price" formula is set by §101-bb(2) without the intervention of the wholesalers. The wholesaler is required to file schedules for the permanent or "legal" prices and cannot be raised without the permission of the SLA. "Price" is an intra-brand matter. The filing requirements were upheld in *Admiral Wine & Liquor Co. v. State Liquor Authority*, *supra*, and in *Battipaglia v. State Liquor Authority*, *supra*. In any event, whatever sales puffing is undertaken by the wholesaler to increase sales is the individual action of a wholesaler. The fact that the wholesaler may initially set the legal or permanent price pursuant to the filing requirements of §101-b(3) cannot be considered a Sherman Act violation. See: *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355-6, fn.2 (2d Cir. 1981) *aff'g sub nom.*, *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936 (DC Conn. 1981) There is nothing in §101-bb or Rule 16.4(e) that calls for private action in setting the minimum "price" to the consumer. If §101-b(3) is valid, then §101-bb only adds conditions that are set by "state action" and state supervision.

It is submitted that for reasons which appear in Point IV, *infra*, p. 26, *Parker* should apply to this case. New York has exercised active participation in the regulation and "pointed reexamination" of the filing and pricing policies in supervising the liquor and wine industries. In agreement with the Concurring Opinion of Judge Jasen, this Brief incorporates the documentation contained in the opinion (64 N.Y.2d at 526-529) wherein he concludes:

"There can be no question that the challenged program has historically and periodically been subject to pointed reexamination by means of official, legislative oversight."

III

SECTION 101-bb, AS SUCH, DOES NOT VIOLATE THE SHERMAN ANTITRUST ACT

The threshold question is whether New York's liquor price program under §101-bb which prevents retail package stores from selling liquor to consumers below "cost" violates the Sherman Antitrust Act. (15 U.S.C. §1) The Sherman Act provides that: "Every contract, combination, in the form of a trust or otherwise, or conspiracies, in restraint of trade or commerce among nations, is illegal." §101-bb does not authorize nor compel private parties to enter into contracts or combinations to fix prices in violation of the Sherman Act. *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981), *aff'g sub nom.*, *Serlin Wine & Spirit Merchants v. Healy*, 512 F.Supp. 936 (D.C. Conn. 1981); *Battipaglia v. N.Y. State Liq. Auth.*, *supra*; nor does it compel merchants to enter into fair trade agreements to fix prices or file schedules that were binding upon the entire industry, including non-parties, as was the case in California where the statute was held invalid in *Midcal*, *supra*.

A. A Violation Of The Sherman Act Cannot Be Based Upon Unilateral State Action.

Judge Jasen, (in disagreement with the majority on the Sherman Act issue), opined:

"Section 1 of the Sherman Act is directed only at joint action and does not proscribe independent business actions and decisions. (*Modern Home Inst. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 108-109.) The statute embraces a fundamental distinction between concerted and independent action. (*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. ___, 104 Ct. 2731, 2740.) Unlike the California statute in *Midcal*, the New York regulatory scheme does not authorize or compel private parties to enter contracts or combinations in restraint of trade, nor does it condone agreements

between *independent* businessmen. (citations omitted). A wholesaler may freely set prices under the New York regulatory system; his conduct is strictly unilateral. The language of the Sherman Act should not be extended to preempt a system of state regulation where the challenged conduct involves a matter of special state interest (US Const 21st amend), and there is no agreement or joint action in restraint of trade at issue."

"The Supreme Court has traditionally been hesitant to apply the Sherman Act in a manner which would defeat the policy of the State.

.....

"This State's regulatory scheme may be easily reconciled with section 1 of the Sherman Act (citations omitted) by recognizing that the regulatory scheme is of a clear intrastate character, no question of joint action in restraint of trade is involved, the distribution of alcoholic beverages has been denominated a proper concern for the States, and New York's liquor pricing scheme is congruous with the Federal Policy favoring competition. Thus, Federal antitrust policy has not realistically been contravened by New York's regulation of liquor prices." (64 N.Y.2d 524-6) See also: *United States v. Colgate & Co.*, 250 U.S. 300, 305-6, 39 S.Ct. 465, 63 L.Ed 992 (1919)

In *Fisher v. Berkley*, 475 U.S. ___, 106 S.Ct. ___, 89 L.Ed.2d 206 (No. 84-1538 Feb 26, 1986), this Court upheld a city ordinance imposing rent ceilings on residential property. In recognizing the function of a "sovereign" state, the Court stated: per Marshall, J.: (89 L.Ed.2d at 211)

Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court noted in *Rice v. Norman Williams*, *supra*, that a 'state statute

is not preempted by the federal antitrust laws simply because the state scheme may have an anti-competitive effect.' *Id.* at 659" (citations omitted)

The *Fisher* Court distinguished unilateral from concerted action and stated: (89 L.Ed. at 212)

"The distinction between unilateral and concerted action is critical here. Adhering to the language of §1, this Court has always limited the reach of that provision to 'unreasonable restraints of trade effected by a "contract, combination . . . , or conspiracy" between separate entities.' *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 81 L.Ed.2d 628, 104 S.Ct. 2731 (1984) (emphasis in original). We have therefore deemed it 'of considerable importance' that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763, 79 L.Ed.2d 775, 104 S.Ct. 1464 (1984). Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under §1 in the absence of agreement. *Id.*, at 760-761, 79 L.Ed.2d 775, 104 S.Ct. 2378; *United States v. Parke Davis & Co.*, 362 U.S. 29, 44, 4 L.Ed.2d 505, 80 S.Ct. 503 (1980)."

See also: *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (DC Cal.1982) *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F.Supp. 641 (DC Ohio, 1982.)

In *Rice v. Norman Williams*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed. 1042, this Court stated:

"A state statute is not pre-empted by federal antitrust laws simply because the state scheme might have anti-competitive effect."

B. Mandatory Mark-up Statute Limited To Unilateral State Action Have Been Upheld In Lower Courts As Not Violative Of The Sherman Act.

§101-bb and similar State statutes present an entirely different pricing structure than the statute involved in *Midcal*. Such statutes do not permit or mandate private parties to engage in illegal trade agreements fixing the resale prices. Such statutes represent unilateral State action. *Morgan v. Division of Liquor Control, supra*; *Fisher Foods, Inc. v. Ohio Department of Liquor Control, supra*; *Enrico's, Inc. v. Rice, supra*.

§101-bb sets a floor by prohibiting a retail sale below "cost". While the individual wholesaler's prices to the retailer are not fixed until his first filing of a schedule pursuant to §101-b(3); this determines the legal or permanent price. The wholesaler may file a monthly schedule to "post-off" or reduce prices, but he cannot increase the legal price without the approval of the SLA. This price structure is akin to the Connecticut statutes which were challenged in *Morgan v. Division of Liquor Control, supra*, except that in *Morgan* the three-tiered price structure places no price restrictions on the schedules filed by the manufacturer or outside shipper, but does so with respect to the wholesaler.

In upholding the pricing structure in Connecticut, the Second Circuit stated: (664 F.2d at 355)

"In contrast, the State of Connecticut establishes the markup and does not permit private parties to engage in resale price maintenance. The State of Connecticut does not control the initial offering price determined by the manufacturers or out-of-state shipper. Once that price is reported and without any compulsion or participation by the State, the statutory scheme defines the wholesale and retail prices which must be charged. Unlike the California statute in *Midcal*, the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of §1 of the Sherman Act. See *Fuchs Sugar*

& *Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1029 (2d Cir.), cert. den., 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979) (to violate the Sherman Act, 'the contract, combination or conspiracy must reflect an agreement between independent businessmen.')

In footnote 2, the *Morgan Court* made this pertinent observation: (Id. at 355-6)

"It may appear that the Connecticut system permits beer and wine producers and shippers to establish resale prices. The automatic application of the statutory markup to the initial offering price would seem to allow those who set the price to determine ultimate resale prices by adjusting their offering price. But this result occurs only because the *State* has dictated the markups, not because any producers or shippers have formed a conspiracy or combination. Moreover, the fierce competitive pressures at the retail level should prevent manufacturers from conspiring to establish prices for alcoholic beverages."

In *Fisher Foods, supra*, the plaintiff challenged the regulation of the Ohio Liquor Control Commission which required mandatory markups on the cost of beer and wine. The Court found the Ohio structure similar to the Connecticut statute and that the unilateral act of the State did not offend the Sherman Act.

IV

ASSUMING, ARGUENDO, THAT §101-bb, AS EXTENDED BY BULLETIN 471, PRESENTS A *PER SE* VIOLATION OF THE SHERMAN ACT, THE STATUTE IS PROTECTED UNDER THE STATE ACTION IMMUNITY

Assuming, *arguendo*, that New York's pricing structure is deemed by this Court to "implicate Federal antitrust interests," the "State action" doctrine immunizes the pricing scheme from antitrust liability under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct.307 (1947)

The *Midcal* Court noted that the California statute differed from the approach of "those States that completely control the distribution of liquor within their boundaries. * * * Such comprehensive regulation would be immune under *Parker v. Brown* since the State would 'displace unfettered business freedom' with its own power." (445 U.S. at 106, fn. 9)

As discussed in this Brief at p. —, *supra*, *Parker* restated and analyzed the two-prong standard applicable to "state action exemption". The *Midcal* Court found no active supervision nor positive administration of the wine pricing scheme by California and consequently adopted the California Court's decisions to deny *Parker* immunity based on the findings of that Court.

The Majority Opinion, relying on *Midcal* and its interpretation of *Parker*, held that the New York statute is not entitled to the "state action" immunity, (64 N.Y.2d at 516).⁷ The Concurring Opinion (64 N.Y.2d at 525-529), in disagreement with the Majority's conclusion on the *Parker* issue, found that the state action immunity was successfully involved by an instrumentality of the State in its sovereign capacity. Judge Jasen presented the

⁷ Notwithstanding its ruling on the *Parker* issue, the Majority spells out New York's active interest in administering and controlling price structures, consistent with the findings of the Concurring Opinion. (64 A.D.2d at 513, 518-521)

following factors: 1) The State set the minimum resale price unilaterally; 2) The SLA conducts careful reexamination of the price maintenance program; 3) Under the rule making authority, SLA has responded to market forces, and may pass through increases in price to reflect increases in labor and operating costs; 4) With the permission of the SLA, and upon proper application, a retailer may offer to sell liquor at a price less than cost; 5) The SLA may determine the desirability to continue certain proscriptions as applied to the industry at large or in individual cases; 6) The active State's continued supervision of the law and by the State Legislature.

The Majority Opinion delineates New York's active supervision and "pointed reexamination" (referred to in *Midcal*) and should have reached the same conclusion as the Concurring Opinion on the *Parker* issue. (fn.7., *supra*)

THE TWENTY-FIRST AMENDMENT DICTATES DEFERENCE TO THE STATE STATUTE

§101-bb does not offend the Sherman Act, and even if it did, it should be saved by "state action" immunity. If this is so, a discussion of the interaction and accommodation of the Twenty-First Amendment to the Commerce Clause would become irrelevant. Since the New York Majority Opinion relied solely upon the Twenty-First Amendment to validate the New York statute, such discussion becomes appropriate.

The Twenty-First Amendment granted broad authority to the States to regulate and control the manufacture, sale or possession of alcoholic beverages, but not to the exclusion of all Federal interests under the Commerce Clause. From *Hostetter v. Idlewild Liquor Corp.* (377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350), the following passage was quoted in *Midcal*:

"Although the States retain substantial discretion to establish other liquor regulations, those controls may be subject to the Federal commerce power in appropriate situations. The competing State and Federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (445 U.S. at 110)

In *Battipaglia v. State Liquor Auth.*, *supra*, the late Judge Friendly, in upholding the filing requirements of §101-b(3), analyzed the structure of the ABC Law and found that the New York statute did not conflict with the Sherman Act, but, if it did, "the interests of New York were to prevail" under the Twenty-First Amendment. (664 F.2d at 170). In *Serlin Wine & Spirit Merchants v. Healy*, *supra*, *aff'd sub nom. Morgan v. Division of Liquor Control*, *supra*, the Court explained the interaction between the Sherman Act and the Twenty-First Amendment as follows: (512 F.Supp. at 943-4)

"The absence of any facial antitrust violation in the Liquor Control Act itself, or in its enforcement by the Liquor Control Commission; the narrow intrastate application of the law; no Congressional usurpation, or expressed national interest in liquor control; 'wide latitude' granted to the States by the courts in light of the Twenty-first Amendment, all balanced against a national policy in favor of competition expressed through a federal law aimed at essentially private conduct, causes this Court to decline to engage in economic interference with State legislative policy absent the opprobrious conduct found to exist"

Where the State regulations are so "closely related to the powers reserved by the Twenty-first Amendment, the regulation may prevail notwithstanding a conflict between its provisions and Federal policies". (*J.A.J. Liquor Store v. New York State Liquor Auth.*, *supra*, 64 N.Y.2d at 517 citing *Bacchus Imports v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 84 L.Ed.2d at 212, quoting from *Capital Cities Cable v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d, 580)

The New York statute differs from the statute in California. *Midcal* observed that in a proper case, the Court will weigh the competing interest to determine whether the Twenty-First Amendment excepts the State regulation. (445 U.S. at 107-8)

The record discloses that the New York statute in relation to the Sherman Act is innocuous, while of great importance to the State of New York. In fact, its objective and function is to protect the public, the consumer and the industry in general without mandating a binding "fair trade" agreement between private parties. Thus, the interests of the sovereign State of New York, in actively regulating the sale and distribution of alcoholic beverages, outweighs the Federal interests in the antitrust laws. The N.Y. Court of Appeals correctly applied these principles in this case.

VI

CONCLUSION

The validation of §101-bb should be upheld on the following grounds:

1. The statute does not present a violation of the Sherman Act and is facially and actually a valid exercise of the State power under the Twenty-First Amendment.

2. Assuming that Bulletin 471 does present a Federal antitrust question, this Court should limit its declaration of invalidity to the Bulletin.

3. In any event, the State has satisfied both requirements under the *Parker v. Brown* State action doctrine providing immunity in that the policy is clearly articulated and the record clearly discloses the State's interest, active supervision and administration of the statute.

4. In any event, the State's demonstrated interest articulated in the statute outweighs the Federal interest in the Sherman Act in this case. It is clearly demonstrated that the purpose of the statute is to protect the consumer, at the same time preventing the deterioration of the industry. Thousands of jobs are dependent upon the ruling in this case.

Accordingly, it is respectfully submitted that the decision of the N.Y. Court of Appeals should be affirmed.

Respectfully submitted,

VICTOR FEINGOLD
Attorney for Amici Curiae
Locals 1, 2 and 816

June, 1986

APPENDIX

APPENDIX "1A"

Price-Cutters Ad in N.Y. Times, November 19, 1984

Price-Cutters

THE NEW YORK TIMES, MONDAY, NOVEMBER 19, 1984

WELCOME OUR NEWEST MEMBERS

ILC LIQUORS INC. (next to Post Office)
1263 DEER PARK AVENUE, NORTH BABYLON, N.Y.
516-586-7400

CORNWALL LIQUOR STORE
879 MAIN ST., CORNWALL, N.Y.
914-534-5140

WINE AND LIQUORS

THANKSGIVING SALE

<p>B & G ST. LOUIS CHARDONNAY 419 750 ml WITH THIS PRICE CUTTER COUPON</p>	<p>MANSCHEWITZ CREAM WHITE CONCORD 349 1.5 liter WITH THIS PRICE CUTTER COUPON</p>	<p>TAYLOR CALIF. CELLARS CHABLIS 649 1 liter WITH THIS PRICE CUTTER COUPON</p>	<p>LESS THAN 1499 750 ml</p>
<p>ALMADEN GOLDEN CHABLIS 699 1 liter WITH THIS PRICE CUTTER COUPON</p>	<p>PAUL MASSON LIGHT CHABLIS ROSE 419 1.5 liter WITH THIS PRICE CUTTER COUPON</p>	<p>GIACOBACCI BIANCO 316 1.5 liter WITH THIS PRICE CUTTER COUPON</p>	<p>Ask About \$1.50 COUPON OFFER</p>
<p>RIUNITE LAMBRUSCO 316 1.5 liter WITH THIS PRICE CUTTER COUPON</p>	<p>BOLLA VALPOLICELLA BAROLO SOAVE 329 750 ml WITH THIS PRICE CUTTER COUPON</p>	<p>FONTANA CANDIDA FRASCATI 309 750 ml WITH THIS PRICE CUTTER COUPON</p>	<p>RUFFINO CHIANTI CLASSICO 259 750 ml WITH THIS PRICE CUTTER COUPON</p>
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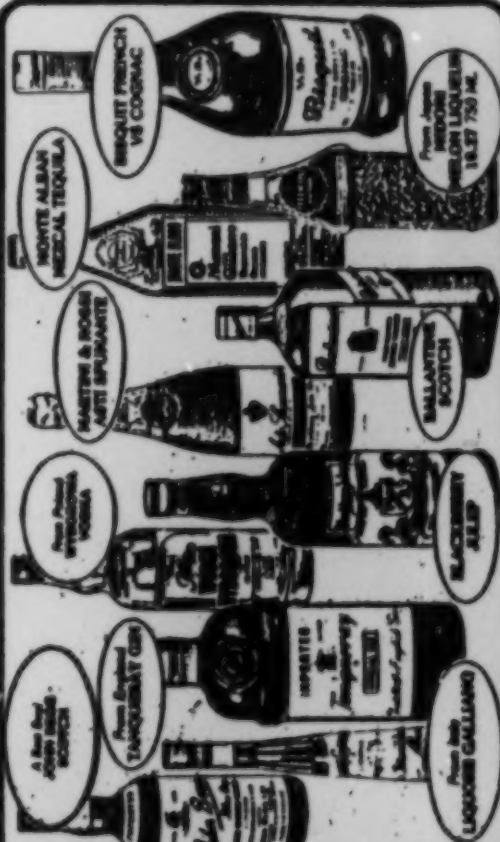
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BRIEF

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In the Supreme Court of the United States
October Term, 1985

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,
Appellant,

v.

THOMAS DUFFY, ANN GLADWIN, ROBERT DOYLE,
TERRENCE R. FLYNN AND FREDERICK PANNOZZO,
Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

**BRIEF OF AMICI CURIAE PEERLESS IMPORTERS,
INC., CHARMER INDUSTRIES, INC. AND THE NEW
YORK STATE WHOLESALE LIQUOR ASSOCIATION,
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Questions Presented

Appellant 324 Liquor Corp.'s challenge to Section 101-bb of the New York Alcoholic Beverage Control Law raises, among other things, the following issues:

1. Should this Court invalidate a state statute on Supremacy Clause grounds where the injury to the plaintiff and the alleged conflict with federal law are caused by a separate administrative agency bulletin and would be cured by invalidation of that bulletin alone?
2. Does Section 101-bb operate through private agreements or directly impose its minimum mark-up requirement without regard to such agreements?

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In the Supreme Court of the United States
October Term, 1985

324 LIQUOR CORP., d/b/a YORKSHIRE WINE & SPIRITS,

Appellant,

v.

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TERRENCE R. FLYNN AND FREDERICK PANNOZZO,

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INC., CHARMER INDUSTRIES, INC. AND THE NEW
YORK STATE WHOLESALE LIQUOR ASSOCIATION,
INC. IN SUPPORT OF APPELLEES**

Peerless Importers, Inc., Charmer Industries, Inc. and the New York State Wholesale Liquor Association, Inc. (respectively referred to as "Peerless", "Charmer" and "the Association" and collectively referred to as the "Wholesaler *Amici*") submit this brief as *amici curiae* with consent of the parties.

The Interest of the Wholesaler *Amici*

Peerless, Charmer and the Association are, respectively, two alcoholic beverage wholesalers and an association of alcoholic beverage wholesalers in New York State. The Wholesaler *Amici* have a vital interest in maintaining the

statute at issue in this appeal, Section 101-bb of the New York Alcoholic Beverage Control Law.¹ Section 101-bb requires that a retailer of liquor sell its products at no less than 12% above the wholesale price.

Preservation of Section 101-bb is in the Wholesaler *Amici's* interest since the minimum retail mark-up statute preserves small retail liquor stores and prevents concentration at the retail level.

The Wholesaler *Amici* would suffer financial loss if small retail stores were eliminated in New York. Small retail stores constitute a major part of the Wholesaler *Amici's* customer base. Substantial amounts of credit have been and will continue to be extended by the Wholesaler *Amici* to these small retailers. Without the statute, many, if not most, of such small retail stores could not survive.

A market dominated by a small number of large retailers or blocs of retailers would also be detrimental to the Wholesaler *Amici*. Dominant retailers or blocs of retailers in a concentrated market might seek to pressure wholesalers into granting illegal discriminatory discounts,² as well as price concessions that, while legal, would adversely impact a wholesaler's gross and net profits.

The Wholesaler *Amici* also have an interest in the outcome of this appeal since it may determine the circumstances under which the Sherman Act preempts state alcoholic beverage regulation. The Wholesaler *Amici* presently operate in a market subject to and predicated upon extensive state regu-

¹ The Alcoholic Beverage Control Law will hereinafter be referred to as the "ABC Law."

² The New York Senate Excise Committee Report indicates that the prevention of secret price concessions to large retailers was a consideration in amending Section 101-bb. NEW YORK SEN. EX. COMM., FINAL REPORT, at 26 (1971).

lation. A decision by this Court invalidating Section 101-bb would change this environment and create dislocation. Such a decision would probably also cause further uncertainty by prompting antitrust challenges to other provisions of the ABC Law.

Statement of the Case

A. The Parties and Proceedings Below

The parties and proceedings below are set forth in the appellees' brief and in the interests of brevity will not be repeated herein.

B. Section 101-bb

Section 101-bb prohibits retail liquor stores from selling below "cost". The statute defines "cost" as the bottle price posted by a wholesaler in schedules that it files with the New York State Liquor Authority (the "SLA"), pursuant to another provision of the ABC Law, Section 101-b(3)(b), plus a 12% mark-up on that bottle price. In enacting Section 101-bb, the New York legislature determined the 12% mark-up "to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor." 101-bb(2)(b).

The statute imposes its minimum mark-up requirement directly and does not operate through any agreement between any wholesaler and any retailer as to any price charged by the latter.³

³ The statute is intended to prevent large retail liquor stores from driving small retailers out of business. The legislative history and policy of Section 101-bb are described in greater detail in the appellees' brief and in the state trial court's opinion in *House of Spirits, Inc. v. Doyle*, 72 Misc.2d 1036, 339 N.Y.S.2d 495 (Albany Cty. 1972), *aff'd*, 43 A.D.2d 880, 352 N.Y.S.2d 588 (3d Dept. 1974), *aff'd*, 36 N.Y.2d 815, 370 N.Y.S.2d 899 (1975).

C. Rule 16.4(e)

SLA Rule 16.4(e), N.Y. ADMIN. CODE tit. 9, § 65.4(e) (1981), provides a specific formula for the calculation of bottle prices that a wholesaler must post for each item⁴ on the monthly schedules filed with the SLA. Under Rule 16.4(e), the bottle price is calculated by dividing the sum of the case price plus a \$1.92 breakage charge by the number of bottles contained in the case.⁵ The rule does not permit variations without approval of the SLA.

D. Post-Offs and SLA Bulletin 471

After a wholesaler files an initial schedule setting forth its price for an item of liquor pursuant to Section 101-b(3)(b), that filed price becomes the legal (i.e., maximum) price that

⁴ The term "item" is used herein to mean the bottle sizes in which particular brands are sold (i.e., Dewar's Scotch in 1.75, 1.0 and .750 litre bottle sizes).

⁵ Rule 16.4(e) states:

For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority.

A prior version of Rule 16.4(e), in effect from November 3, 1971 to January 1, 1981, provided for a surcharge of 96¢ instead of \$1.92. An earlier version of the rule, in effect before November 3, 1971, provided for a voluntary surcharge of up to \$1.00.

324 Liquor Corp. ("324") originally challenged Rule 16.4(e) on state law grounds but apparently abandoned that challenge. 324 does not challenge the rule in its appeal to this Court. Compare *Joint Appendix* ("JA") at 11 (Verified Petition of December 27, 1982) with Brief for Petitioner-Appellant at 2, *324 Liquor Corp. v. McLaughlin*, 102 A.D.2d 607, 478 N.Y.S.2d 615 (1984), rev'd, 64 N.Y.2d 504, 490 N.Y.S.2d 143 (1985) *prob. juris. noted*, 106 S. Ct. 1456 (1986) (Questions Presented).

the wholesaler may charge for such item of liquor.⁶ However, a wholesaler is free to reduce or "post-off" the per bottle or per case price for such item in its subsequent monthly filings. Such post-offs are voluntary monthly price reductions from the legal price.⁷ Rule 16.4(e) would normally require the post-off case price to be used to calculate the bottle price upon which the 12% mark-up is based.

On June 29, 1973, the SLA issued Bulletin 471. The Bulletin grants a wholesaler certain flexibility in determining the bottle price where the wholesaler posts-off the case price of an item. Bulletin 471 allows pricing discretion only where case post-offs are involved.

Under Bulletin 471, wholesalers that post-off on the case price of an item may (1) elect not to reduce the bottle price, (2) reduce the bottle price to conform with the posted-off case price, or (3) adopt a bottle price anywhere between options (1) and (2). The Bulletin thus establishes the price range within which a wholesaler must set bottle prices when it posts-off case prices.⁸

Summary of Argument

This Court need not invalidate Section 101-bb to resolve the issues raised by 324's antitrust challenge to that statute. The alleged anticompetitive effect that 324 and the United States characterize as resale price maintenance stems from Bulletin 471 and would be cured by invalidation of the Bulletin alone. In the absence of Bulletin 471, the posted bottle prices

⁶ The requirement for a legal or maximum price is set forth in Section 101-b(3)(b).

⁷ The wholesaler is permitted to return to the legal price or post-off in the same or a different amount in each subsequent month without the written permission of the SLA. Wholesalers must state post-off bottle and case prices, as well as legal bottle and case prices, in monthly schedules.

⁸ Bulletin 471 is not an SLA rule and is not part of the New York Administrative Code.

upon which Section 101-bb's 12% minimum mark-up is imposed would always reflect the case prices actually charged (whether at the "legal" price or a post-off price) plus a *de minimis* "breakage fee".

Limiting any Supremacy Clause invalidation to Bulletin 471 is appropriate not only in light of this Court's policy against formulating unnecessarily broad rules of constitutional law but also in light of the New York Court of Appeals' ruling as to the relationship between the Bulletin and Section 101-bb. The decision below held that Section 101-bb was separable from Bulletin 471 and could not be invalidated on account of the Bulletin's alleged anticompetitive effect.

Section 101-bb is, by itself, no different from the minimum mark-up or sales below cost statutes upheld by most state and lower federal courts that have faced the issue. Such statutes differ from retail price maintenance agreements in a critical respect: the command to price above cost or to adhere to a minimum mark-up comes directly from the state, not from any private party.

The absence of any authorization of private agreements distinguishes this case from *Midcal*⁹ and has two consequences: (1) under this Court's decisions in *Fisher*¹⁰ and *Norman Williams*¹¹, Section 101-bb does not irreconcilably conflict with the Sherman Act's prohibition against "contract[s], combination[s] or conspirac[ies]" that unreasonably restrain trade; and (2) the minimum mark-up is directly imposed by New York and, under *Hoover*¹² and *Parker v. Brown*,¹³ is therefore *ipso facto* exempt from antitrust challenge as state action.

⁹ *California Retail Liquor Dealers Ass'n Inc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

¹⁰ *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986).

¹¹ *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

¹² *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984).

¹³ *Parker v. Brown*, 317 U.S. 341 (1973).

Argument

I.

Any "Phantom Bottle Pricing" Would Be Eliminated By Invalidation of Bulletin 471 Alone

This Court "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). This Court would deviate from that practice if it invalidated Section 101-bb on account of the alleged "phantom bottle pricing" that 324 and the United States characterize as resale price maintenance.¹⁴

The purported "phantom bottle pricing" results from Bulletin 471 and would be cured by invalidation of the Bulletin alone. As discussed *infra*, Section 101-bb itself does not contemplate the existence of Bulletin 471 or any other deviation from Rule 16.4(e).

324 would not be subject to any disciplinary action under Section 101-bb if the Bulletin were invalidated. In both its brief and jurisdictional statement, 324 acknowledges that its sales were rendered illegal only because the wholesalers from which it had made purchases exercised the pricing discretion authorized by Bulletin 471. *Brief of Appellant* at 12, *Jurisdictional Statement* ("JS") at 8.

In overruling the intermediate appellate court,¹⁵ the New York Court of Appeals specifically held that any purported

¹⁴ See, e.g., *Brief of Appellant* at 6; see also *Brief of the United States as Amicus Curiae Supporting Appellant* at 11 & n.12.

¹⁵ The decision below is reported with a companion case, *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*.

anticompetitive effect resulting from Bulletin 471 could not be a ground for invalidating Section 101-bb:

Preliminarily, the Appellate Division erred in using the purported anticompetitive effect of Bulletin 471 as a basis for invalidating Section 101-bb. Constitutional problems created by a regulation should be resolved by invalidation of the regulation alone, not invalidation of both the statute and regulation.

324 *Liquor Corp. v. McLaughlin*, 64 N.Y.2d 504, 423, 490 N.Y.S.2d 143, 154 (1985), *prob. juris. noted*, 106 S.Ct. 1456 (1986) (JS at 18A).¹⁶

A. *Bulletin 471, Not Section 101-bb, Authorizes Wholesalers To Post Bottle Prices That Deviate From the Rule 16 Formula*

Bulletin 471, not Section 101-bb, grants the pricing discretion that causes the "phantom bottle pricing" of which 324 and the United States complain.¹⁷

Section 101-bb itself only requires that a retailer not sell liquor below "cost", which is defined as 12% above the bottle price posted by a wholesaler. The statute's use of the posted bottle price as the basis for the 12% mark-up does not contemplate that the posted bottle price would be anything other than a division of the case price, whether the "legal" price or a posted-off price.

This conclusion is compelled by logic and common sense. The "bottle price" of a bottle sold in a posted-off case logically means the result of dividing the case price by the number of bottles in a case.¹⁸ Such a construction, moreover, should be

¹⁶ The New York Court of Appeals' rulings on state law are conclusive. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978).

¹⁷ 324 does not explicitly challenge Bulletin 471 itself on antitrust grounds in this appeal. 324 did not identify Bulletin 471 or refer to any SLA bulletin in the questions presented section of its jurisdictional statement. See JS i-ii.

¹⁸ The pre-1971 version of Section 101-bb also used posted prices as the basis of "cost".

adopted since it avoids doubt as to Section 101-bb's constitutionality. See *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).¹⁹

Construing the posted bottle price to be the division of the posted case price is supported by Rule 16.4(e) which requires a mathematical relationship between the two, plus a *de minimis* breakage charge. An earlier version of Rule 16.4(e) was in effect in 1971 when the legislature amended Section 101-bb to provide for the 12% minimum mark-up.²⁰ The legislature, presumably, was cognizant of Rule 16.4(e) and intended the bottle price referred to in Section 101-bb to be determined in accordance with the rule.²¹

324 has virtually conceded that the Rule 16.4(e) procedure provides for a mathematical relationship between the posted bottle price and case prices, regardless of post-offs. In

¹⁹ In its brief, 324 states that the Court of Appeals upheld Bulletin 471 under Section 101-bb. *Brief of Appellant* at 7. This assertion is incorrect and apparently results from a confusion of Section 101-bb with another provision, Section 101-b(3).

324 bases its assertion on the belief that "[s]pecifically the court below concluded that Bulletin 471 is consistent with Section 101-bb since the statute does not 'mandate any price ratio between scheduled case and bottle prices' ". *Brief of Appellant* at 7 n.6 (purporting to quote JS at 18A). New York's highest court, however, never held that Section 101-bb authorizes bottle prices unrelated to case prices or that Bulletin 471's grant of discretion was consistent with the statute.

What the Court of Appeals actually stated was that the Bulletin's grant of discretion was "consistent with ABC Law §101-b(3) which does not mandate any price ratio between scheduled case and bottle prices." 64 N.Y.2d at 523, 490 N.Y.S.2d at 154 (JS at 18A) (emphasis added). This language, moreover, appears in the context of the Court of Appeals' discussion of 324's challenge to Bulletin 471 on state law grounds.

The Court of Appeals' discussion of the relationship between the statute and the Bulletin was limited to stating that the Bulletin's purported anticompetitive effect could not be a basis for invalidating the statute. The opinion below did not hold, and cannot logically be read to imply, that Section 101-bb contemplates or is predicated upon Bulletin 471.

²⁰ That rule required that bottle price be determined by the number of bottles in the case plus a voluntary surcharge.

²¹ The SLA issued Bulletin 471 on June 29, 1973. The New York legislature, therefore, could not have contemplated the Bulletin when it amended Section 101-bb in May, 1971.

arguing that the 1964 version of Section 101-bb was pro-competitive (and presumably legal), 324's jurisdictional statement states that "cost" under the 1964 version of Section 101-bb "was derived, under the predecessor of SLA Rule 16 . . . by adding a 'breakage' surcharge of 96¢ to the case price, and dividing by the number of bottles in the case." *JS* at 6; see also *Brief of Appellant* at 10.²²

Both 324 and the United States have, on occasion, acknowledged that wholesaler discretion not to pass through case post-offs would not exist but for Bulletin 471.²³ The United States notes in its brief that "Bulletin 471 which authorizes bottle prices that have no direct relationship to the case price, may be viewed as the requisite SLA 'approval' for deviations from Rule 16.4." *Brief of the United States* at 3 n.3. In the memorandum it submitted after the SLA disciplinary hearing, 324 argued that Bulletin 471 was contrary to the ABC Law: "[n]owhere in the ABC law can there be found any basis for the Authority's action in permitting a wholesaler not to pass through the full post-off on the case price". *Joint Appendix* at 48 (emphasis in the original).²⁴

Invalidation of the Bulletin alone would not only eliminate the challenged "phantom bottle pricing" but also would legalize 324's sales and moot its challenge to Section 101-bb. In its brief, 324 concedes that its sales were only illegal because of the pricing discretion granted to wholesalers by Bulletin 471:

Appellant's profit making sales were rendered illegal under New York law only because two whole-

²² In its brief, 324 also incorrectly (and inexplicably) suggests that the 1964 version of Section 101-bb defined "cost" in terms of something other than "the price of such item of liquor to retailers contained" in schedules filed pursuant to Section 101-bb. *Brief of Appellant* at 10.

²³ Both 324's and the United States' briefs at certain points identify Bulletin 471 as the source of the alleged "phantom bottle pricing". *Brief of Appellant* at 7-8; *Brief of United States* at 3-4.

²⁴ There would, of course, be no need for Bulletin 471 if Section 101-bb itself already authorized bottle prices that did not reflect case prices.

alers, each in its sole discretion, had established a substantial differential between the artificially high bottle price and the appropriate fraction of the wholesale case price. Neither sale would have violated the statute had the wholesalers not had the ability to control retail prices by setting a phantom bottle price which was the determinant for the retail price.

Brief of Appellant at 12.

In a footnote to the above quoted passage, 324 also states that termination of the posted bottle price according to Rule 16.4(e) would have made its sales legal. That footnote states in part:

Each wholesaler [from which 324 made purchases] could have computed its bottle price simply by adding the breakage surcharge of \$1.92 to its post-off case price and dividing by the number of containers in the case. SLA Rule 16 (JS App. 70A). . . .

Id. at 12 n.14. 324 thus concedes, as it must, that wholesalers would not be determining minimum markups if Rule 16.4(e) were applied without qualification.

B Section 101-bb Is Independent of Bulletin 471 and Cannot Be Invalidated On Account Of the Bulletin's Alleged Anticompetitive Effect

Any infirmity on the part of Bulletin 471 does not require invalidation of Section 101-bb. Section 101-bb itself does not refer to the subject matter of Bulletin 471: wholesaler discretion to reduce or not reduce bottle prices to reflect case post-offs. The materials in Section 101-bb's bill jacket similarly contain no reference to those matters. Bulletin 471, moreover, did not exist when the legislature amended Section 101-bb in 1971. Section 101-bb does not contemplate the existence of Bulletin 471 and can remain in effect without regard to the latter's status.

The New York Court of Appeals, as previously noted, differentiated Section 101-bb from Bulletin 471 and held that the statute could not be invalidated on account of the Bulletin. 64 N.Y.2d at 523, 490 N.Y.S.2d at 154 (JS at 18A). This approach was compelled by the Court of Appeals' earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983). In *Loretto*, the court stated:

Such problem as the present regulation creates will be sufficiently taken care of by modifying the judgment to declare the *regulation* invalid, but does not require invalidation of the underlying *statute*.

Id. at 154, 459 N.Y.S.2d at 750 (emphasis in original).²⁵

The New York court's ruling as to the severability of the statute and the bulletin is also consistent with Section 161 of the ABC Law. That Section provides for the severance of any invalid section from the balance of the ABC Law.

C. The Principle of Resolution On the Narrowest Constitutional Issue Means That Any Invalidation Should Be Limited To Bulletin 471 Alone

This Court need not invalidate Section 101-bb to resolve the antitrust conflict created by the alleged phantom bottle pricing and need not even consider the statute's legality to decide whether 324 could have charged its 1981 mark-ups without penalization. Striking down Section 101-bb on Supremacy Clause grounds would violate "the long-established

²⁵ A New York intermediate appellate court has applied this principle in the context of a Sherman Act challenge to an alcoholic beverage law. In *Metropolitan Package Store Association, Inc. v. Koch*, 89 A.D.2d 317, 457 N.Y.S.2d 481 (3d Dept. 1982), *appeal dismissed*, 464 U.S. 802 (1983), the Supreme Court, Appellate Division, rejected an antitrust attack on a local New York City liquor excise tax law where the claimed Sherman Act conflict was with an SLA bulletin, not the law itself. The Appellate Division "reject[ed] [the] plaintiffs' argument as erroneously premised upon Bulletin 529 which . . . [was] not at issue." 89 A.D.2d at 326, 457 N.Y.S.2d at 487.

rule that this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Kremens v. Bartley*, 431 U.S. 119, 137 (1977) (quoting *Liverpool, New York & Philadelphia Steamship Co. v. Emigration Commissioners*, 133 U.S. 33, 39 (1885)).²⁶

The policy of only invalidating statutes where necessary has led this Court to sever unconstitutional portions of a statute and allow constitutional portions to stand. *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2801 (1985). "[P]artial, rather than facial, invalidation is the required course." *Id.* at 2802.

The same reasoning should limit any invalidation to Bulletin 471 alone, particularly in light of Section 161's severance provision and the New York Court of Appeals' ruling as to the separability of the Bulletin and statute. The invalidity of an administrative agency bulletin need not affect the validity of a statute, just as the unconstitutionality of a portion of a statute does not necessarily affect the validity of its remaining provisions. *Cf.* Section 161; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 235 (1932) (discussing severability clause).

Invalidation of Bulletin 471 alone would both eliminate the alleged antitrust conflict and moot the case or controversy presented by 324's action. Wholesaler discretion in passing through case post-off discounts to individual bottle prices and the possibility of "phantom bottle prices" would disappear with Bulletin 471. Striking down Section 101-bb on the record in this case would contradict the policy against unnecessary constitutional rulings.²⁷

²⁶ "[T]he preferred course of adjudication [is that which] enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985); *see also Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

²⁷ The interests of federalism and the Twenty-First Amendment, moreover, make the unnecessary invalidation of Section 101-bb particularly inappropriate.

(footnote continued)

II.

Section 101-bb's Definition of Cost In Terms of Currently Posted Bottle Prices Makes Enforcement Practicable and Is Justified Since Such Prices are the Replacement Costs for Previously Purchased Bottles

In their briefs, 324 and the United States for the first time argue that Section 101-bb's use of currently posted bottle prices in the definition of cost enables wholesalers to fix minimum retail mark-ups.²⁸ This argument lacks merit.

Defining cost in terms of currently posted prices is justified because it makes enforcement of the statutes possible. Over

The strong legislative and state court pronouncements of the state interests served by Section 101-bb further distinguish this case from *Midcal*, 445 U.S. 97. See N.Y. SEN. EX. COMM. FINAL REPORT. A comparison of the New York Court of Appeals' decisions in this case and in *House of Spirits, Inc. v. Doyle*, 36 N.Y.2d 815, 370 N.Y.S.2d 899 (1975), on one hand, and that of the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978), on the other, in particular demonstrates that New York's interest in Section 101-bb is greater than that of California in the *Midcal* statute. Cf. *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 176-79 (2d Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985) (Friendly, J., comparing New York's interest in Section 101-b(3)(b) of the ABC Law with California's interest in the *Midcal* statute).

The Wholesaler *Amici* adopt and agree with the discussion of state interests and the Twenty-First Amendment analysis contained in the Appellees' brief.

²⁸ 324 did not make this argument in the New York Court of Appeals. 324 also relies on material that did not appear in the record below. Compare JS at 101A with Record at i-ii, 324 *Liquor Corp. v. McLaughlin*, 64 N.Y.2d 504, 490 N.Y.S.2d 143 (1985), prob. juris. noted, 106 S. Ct. 1456 (1986) (Table of Contents). The New York court accordingly did not consider whether Section 101-bb's use of currently posted prices violates the Sherman Act.

This Court should therefore not consider 324's "timing" argument. "Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires [this Court] to decline to consider and decide questions affecting the validity of statutes not urged or considered there." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

10,000 different items are sold by retailers in New York. Defining cost in terms of the actual prices paid for each item would require on-site inspection of retail liquor stores, the taking of inventories, examination of invoices to determine the price paid for each item in the store, and identification of each item with a particular invoice to determine its cost. The thousands of different items sold by retailers make such a procedure unworkable and impracticable. Use of the current bottle price, which represents the price offered to all retailers, permits the SLA to detect violations merely by comparing prices charged by retailers with the scheduled bottle prices. Effective enforcement is thus possible.

Currently posted prices also represent the costs of replacing previously purchased goods. Section 101-bb is thus similar to statutes which prohibit below cost sales and define cost in terms of replacement cost. 324 does not dispute the legality of such statutes. See *Brief of Appellant* at 40 & n. 41.

III.

Standing Alone, Section 101-bb Is Not Invalid Under the Antitrust Laws Since It Does Not Authorize New York Wholesalers to Fix Resale Prices

Standing alone, Section 101-bb is no different from the minimum mark-up or below cost prohibition statutes that at least seven lower federal and state courts have upheld in the face of antitrust challenge.²⁹ Neither 324 nor the United States

²⁹ E.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), aff'g *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn.); *Fisher Foods, Inc. v. Ohio Department of Liquor*, 555 F. Supp. 641 (N.D. Ohio 1982); *Little Rock School District v. Borden, Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,493 (E.D. Ark. 1980); *George W. Cochran Co. v. Comptroller*, 292 Md. 3, 437 A.2d 194 (1981); *Walker v. Bruno's, Inc.*, 650 S.W.2d 357 (Tenn. 1983); *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 328 S.E.2d 144 (W. Va. 1984); accord *Baseline Liquors v.*

argue that such statutes are invalid. See *Brief of Appellant* at 23-24.³⁰

Like other minimum mark-up statutes, Section 101-bb does not legalize or operate through private agreements. This lack of any authorization of private concerted action means (1) that, under *Fisher*³¹ and *Norman Williams*,³² Section 101-bb does not irreconcilably conflict with Section One of the Sherman Act; and (2) that the minimum mark-up is directly imposed by the State, and, under *Hoover*³³ and *Parker v. Brown*³⁴ is therefore *ipso facto* exempt from antitrust challenge.

A. Section 101-bb's Minimum Mark-Up Requirement Does Not Depend On Any Private Agreement Or Delegation Of Power To Private Actors

Under Section 101-bb, New York imposes its 12% minimum mark-up directly and without regard to authorized or unauthorized agreements among private parties. The ban against sales below cost and the definition of cost to include a 12% minimum mark-up are not terms contained in any sales

Circle K Group, 129 Ariz. 215, 630 P.2d 38 (Ariz. Ct. App.), cert. denied sub nom. *Skaggs Drug Centers, Inc. v. Baseline Liquors*, 454 U.S. 969 (1981).

The California Supreme Court's decision in *Rice*, relied upon by this Court in *Midcal*, also approved of statutory prohibitions against sales below cost. In invalidating statutory resale price maintenance, the *Rice* court held that a purported goal of that scheme—protection of small independent retailers—was already served by California's sales below cost statute:

Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act. Thus, our laws prohibit the sale of any product as a "loss leader" (Bus. & Prof. Code, § 17044) . . .

21 Cal. 3d at 458, 146 Cal. Rptr. at 603, 579 P.2d at 494. See also *id.* at 457 n.24, 146 Cal. Rptr. at 602 n.24, 579 P.2d at 493 n.24.

³⁰ The United States concedes that minimum mark-up statutes "might . . . constitute 'state action.'" *Brief of United States* at 11 n.11.

³¹ 106 S. Ct. 1045.

³² 458 U.S. 654.

³³ 104 S. Ct. 1989.

³⁴ 317 U.S. 341.

agreement between any wholesaler and any retailer. The minimum mark-up requirement is not the result of any delegation of price-fixing power to any private party.

Statutes such as Section 101-bb thus differ from resale price maintenance in a critical respect: the command to price above cost or to adhere to a minimum mark-up comes directly from the State, not from another private party. A statute that prohibits sales below cost does not authorize any conspiracy but instead only "directs individual retailer compliance." *Schnapps Shop, Inc. v. H.W. Wright & Co.*, 377 F. Supp. 570, 583 n.11 (D. Md. 1973). "Since neither the wholesalers nor the retailers determine the mark-ups to be charged, obeying the statute should involve no combination or conspiracy for the purposes of the Sherman Act." Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693, 733 (1974).³⁵

Section 101-bb therefore does not place "irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Norman Williams*, 458 U.S. at 661.

³⁵ The Second Circuit's opinion in *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), contains a particularly lucid discussion of the difference between determination of initial prices and determination of the minimum percentage mark-up imposed on those prices. That case involved an antitrust challenge to Connecticut's minimum mark-up statute for beer and wine.

In upholding the Connecticut statute as state action, the *Morgan* court stated:

It may appear that the Connecticut system permits beer and wine producers and shippers to establish resale prices. The automatic application of the statutory mark-up to the initial offering price would seem to allow those who set that price to determine ultimate resale prices by adjusting their offering price. But this result occurs only because the State has dictated the mark-ups, not because any producers or shippers have formed a conspiracy or combination.

Id. at 355-56 n.2; accord Posner, 49 N.Y.U. L. Rev. at 721-22 (unlike resale price maintenance laws, a minimum mark-up statute "not only reflects a legislative judgment that retailers should be required to charge certain minimum prices, but reflects a judgment as to what those prices should be").

B. Section 101-bb Presents No Irreconcilable Conflict With Federal Antitrust Law

Under *Fisher*, the lack of concerted action means that Section 101-bb does not irreconcilably conflict with the Sherman Act. See 106 S. Ct. 1045. The absence of such irreconcilable conflict precludes preemption of a state statute on antitrust grounds. *Norman Williams*, 458 U.S. 654.³⁶

Section One of the Sherman Act only prohibits agreements by a plurality of actors in restraint of trade: "'contract[s], combination[s] . . . or conspirac[ies]'". *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). A state statute must accordingly command the concerted action condemned by the Sherman Act in order to present a conflict that is grounds for preemption.

This Court's decision in *Fisher* demonstrates the necessity of agreement. *Fisher* involved an antitrust challenge to a city's rent stabilization ordinance. In upholding the ordinance, this Court recognized that the challenged rent ceilings were unilaterally imposed by the City of Berkeley and were not the result of private concerted action. Under this Court's decision in *Norman Williams*, the ceilings and ordinance therefore did not irreconcilably conflict with the Sherman Act even though their economic effect might be identical to that of a private cartel.³⁷ Justice Marshall's opinion states:

What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords'

³⁶ As this Court stated in *Norman Williams*:

Our decisions in this area instruct us, therefore, that a state statute when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust law in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

458 U.S. at 661.

³⁷ Potential for conflict and anticompetitive effect are not substitutes for actual compulsion of private illegal conduct. *Norman Williams*, 458 U.S. at

(footnote continued)

cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.

106 S. Ct. at 1049.

Section 101-bb's minimum mark-up requirement is analogous to the rent ceilings at issue in *Fisher*. *Fisher's* emphasis on the lack of private agreement is in fact similar to the reasoning of lower federal and state court decisions that have recognized that minimum mark-up statutes do not operate through private concerted action. Compare 106 S. Ct. at 1049-51 with, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 & n.2 (2d Cir. 1981), and *George W. Cochran Co. v. Comptroller*, 292 Md. 3, 11, 437 A.2d 194, 198 (1981).

Like the Berkeley rent ceilings in *Fisher*, the 12% minimum mark-up does not result from private agreement but is instead "unilaterally imposed by government to . . . the exclusion of private control." 106 S. Ct. at 1049. Section 101-bb's minimum mark-up presents no irreconcilable conflict with the Sherman Act, just as the *Fisher* rent ceilings presented no such conflict.³⁸

659-661, 662 n.7; accord *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110-111 (1978). "The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute", and "[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." *Norman Williams*, 458 U.S. at 659; see also *id.* at 662 n.7.

³⁸ It may be noted that Section 101-bb does not shield private resale price maintenance agreements from antitrust scrutiny. Statutes prohibiting sales below cost do not allow alcoholic beverage wholesalers to enforce resale price maintenance agreements with retailers, and violations of such laws are not a defense in any antitrust action. *Schnapps Shop, Inc. v. H. W. Wright & Co.*, 377 F. Supp. 570, 583 (D. Md. 1973) ("The Maryland Unfair Sales Act contains no provision sheltering combinations or refusals to deal" and does not legalize resale price maintenance schemes).

The availability of antitrust remedies further compels the conclusion that Section 101-bb does not irreconcilably clash with the Sherman Act. See *Norman Williams*, 458 U.S. at 662.

C. *The Minimum Mark-Up Requirement Is Imposed Directly By New York and Is Therefore Immune As State Action Under Parker v. Brown*

The mere fact that New York directly imposes the minimum mark-up requirement immunizes Section 101-bb from antitrust attack under *Parker v. Brown*. The reasons behind *Parker v. Brown*'s state action doctrine are set forth in *Hoover*:

The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." ... *Parker*, 317 U.S., at 351, 63 S. Ct., at 313. The only requirement is that the action be that of "the State acting as sovereign." *Bates*, 433 U.S., at 360, 97 S. Ct., at 2697.

104 S. Ct. at 1998. "[W]hen a state legislature adopts legislation, its actions constitute those of the state ... and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover*, 104 S. Ct. at 1995.³⁹

Section 101-bb's minimum mark-up meets what *Hoover* identified as the "only requirement" for state action immunity: the state acts as a sovereign and imposes such restraints directly. See also *Morgan*, 664 F.2d at 355-56 n.2 (upholding state minimum mark-up statute); *Fisher Foods Inc. v. Ohio Department of Liquor Control*, 555 F. Supp. 641, 646-47 (N.D. Ohio 1982) (same); *Little Rock School District v. Borden, Inc.*,

³⁹ Under *Hoover* Section 101-bb need not meet the *Midcal* two-prong test since the statute imposes its mark-up requirement directly and not through delegation of power to private parties. The *Midcal* criteria only apply where persons other than the state legislature or court of last resort restrain trade pursuant to state authorization. The test does not apply where the challenged activity is unquestionably that of the State. 104 S. Ct. at 1995-96.

It may in any case be noted that, prior to *Hoover*, significant authority held that minimum mark-up statutes would meet the active supervision, as well as the clear articulation, prong of *Midcal*. See, e.g., *Fisher Foods*, 555 F. Supp. 641; *Serlin*, 512 F. Supp. 936; *Cochran*, 292 Md. 3, 437 A.2d 194; accord *Posner*, 49 N.Y.U. L. Rev. at 721-22 (state supervision, while missing from resale price maintenance statutes, is present in minimum mark-up laws).

1980-2 Trade Cas. (CCH) ¶63, 493 at 76,618 (E.D. Ark. 1980) (same).

A comparison with *Parker v. Brown* itself further illustrates that Section 101-bb is state action that is exempt from antitrust attack.⁴⁰ In upholding the raisin marketing program at issue in *Parker v. Brown*, this Court emphasized that the challenged restraint did not result from any agreement among private persons or even between the state and private persons. 317 U.S. at 350.⁴¹

As in *Parker*, the source of any decision to restrain trade embodied in Section 101-bb comes from New York, not private persons. New York's minimum mark-up requirement was "never intended to operate by force of individual agreement or combination"; instead it results from a decision by the legislature and is directly administered by the state. See *Parker*, 317 U.S. at 350.⁴² Cf. *Cochran*, 292 Md. at 11, 437 A.2d at 198.⁴³

⁴⁰ *Parker* involved an antitrust challenge to a California statute that authorized collective raisin marketing programs which largely eliminated price competition among producers.

⁴¹ "[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350.

⁴² The case for state action is, moreover, even stronger in this case than in *Parker*. The raisin marketing programs at issue in *Parker* were collective arrangements that took effect after petition by private producers.

Unlike the California prorate statute, Section 101-bb does not provide for any joint activity or any state action upon private initiative. Cf. *Serlin*, 512 F. Supp. at 940 ("The role played by liquor manufacturers in establishing wholesale and retail prices under the [Connecticut] Liquor Control Act does not approach the level of non-official participation granted to and required of private parties under the program challenged in *Parker*").

⁴³ The reasoning of the Maryland Court of Appeals in upholding a Maryland sales below cost statute in *Cochran* applies equally to Section 101-bb:

The Maryland statute directly imposes its requirements ... without regard to any agreements or arrangements which might or might not exist among those private businesses. Any possible private agreements are irrelevant; the act operates entirely inde-

(footnote continued)

A statutory minimum mark-up requirement such as that of Section 101-bb "is not comparable to the wine pricing scheme at issue in *Midcal*" but "is rather more akin to *Parker* and entitled to immunity." *Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936, 943 (D. Conn.), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981).⁴⁴

pendently of them. The challenged "restraints of trade" are "compelled by the direction of the State acting as a sovereign."

292 Md. at 11, 437 A.2d at 198 (quoting *Bates v. Arizona*, 433 U.S. 350, 360 (1977), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)).

⁴⁴ *Parker v. Brown* also indicates that this Court should defer to the New York legislature's and New York Court of Appeals' determination of the state interests served by Section 101-bb. See *supra* at 13 n. 27; see also *Hallie v. Eau Claire*, 105 S. Ct. 1713, 1719 n. 7 (1985) (close examination of a state legislature's intent "would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny").

Conclusion

The judgment of the New York Court of Appeals insofar as it upholds the validity of Section 101-bb should be affirmed.

Respectfully submitted,

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